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Supreme Court, U.S.
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In The

Supreme Court of the United States

HERMANN GEIER, Survivor of
November 11, 2000 Kaprun Fire, *et al*,

Petitioners,

v.

OMNIGLOW CORPORATION, *et al*,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Nature of the case: introduction

On November 11, 2000 a disastrous fire killed 155 of 167 passengers on a ski train in Kaprun Austria that ascended the mountain in an underground tunnel. The cause of the fire was not discovered until the last year because the train was operated and maintained by a government agency whose officials sought to obfuscate their role in wrongfully modifying components and placement of heaters used in the train, failure to have planned for emergency egress from the train and tunnel, gross under-insurance in noncompliance with Austrian law, and a desire, shared by the entire government not to negatively impact the important Austrian Ski Tourism Industry.

A Multidistrict Litigation ("MDL") panel assigned the series of actions, brought throughout the U.S. to the Honorable Shira A. Sheindlin, United States District Judge for the Southern District of New York.

The defendant manufacturers and agency operators of the train sought to have the American Courts declared *forum non conveniens,* because they understood that they would not lose in the Austrian Courts. The Petitioners on the other hand saw the statute of limitations run in Austria while they sought relief in the United States. They saw the very officials who were being held responsible for gross negligence and

QUESTIONS PRESENTED – Continued

criminal tampering, were the same individuals who were being selected for investigative panels into the causes of the disaster, they saw the criminal investigative bodies were making sham prosecutions leading to not a single conviction, and they saw when the government finally established a commission to receive voluntary contributions from the defendants to pay some damages by mediation, the meager funds were distributed in the most haphazard and boldface inequitable way as to leave children made orphans by the disaster without means of support while awarding significant sums to other less urgent claimants. Where two claimants had similar circumstances and claims, the disparity between their awards was often many-fold. In the end the defendants won the *forum non conveniens* in both the Southern District of New York and in the Second Circuit which declined to either rehear the case or sit *en banc* to rehear it.

Ironically, if the several actions in the diverse Districts had not been consolidated as an MDL in the Southern District of New York, most would have already have been successfully litigated in diverse United States District Courts throughout many of the eleven Circuits whose standards for *forum non conveniens* are more enlightened than those of the Second Circuit.

It is on this background that the families of the victims of Kaprun and the survivors of Kaprun still seek closure and justice for the memories of

QUESTIONS PRESENTED – Continued

themselves and their loved ones a decade later so that the true facts and liabilities may finally emerge.

Questions Presented For Review

1. Can justice be served if in multi-district litigation where cases are brought together from California, Colorado, Pennsylvania, Florida, Ohio, New York, Massachusetts, Maryland, Texas under the management of the Southern District of New York and Second Circuit Courts of Appeals, the approach to *forum non conveniens* conflicts with those of the Districts and Circuits where the cases originated and the issue arises?

2. Do not the interests of justice mandate that this Court provide guidance so that a single standard for analysis and jurisprudence exists for all Circuits with regard to *forum non conveniens* issues?

3. Especially when the proposed alternate forum lies outside the United States, its territories and possessions, is it not in the interests of justice that a set of criteria embody a multi-prong test that must be met before a matter can be dismissed on the basis of *forum non conveniens,* including but not limited to:

   i. Consent to jurisdiction in the foreign forum by the movant advocating the alternate/ foreign forum;

QUESTIONS PRESENTED – Continued

ii. Consent that all dismissed claims can be re-filed and heard in the foreign forum by the movant advocating the alternate/foreign forum;

iii. Consent to waiver of statute of limitation defenses or other objections to hearing of dismissed claims in the foreign forum by the movant advocating the alternate forum;

iv. Requirement that there is resolution between the parties of any condition that might conflict with principles of civil law and civil procedure governing tolling of statutes of limitations in cases originally filed in the alternate forum, rather than cases transferred from foreign courts;

v. Consent to service of process and taking of evidence in accordance with the Hague Convention on service of process and taking of evidence for use in the event the proposed alternate forum is not a party to the Hague Convention;

vi. Consent to production (at movants' costs) of movants' witnesses and evidence at trial in the alternate/foreign forum;

vii. Consent to imposition of generally accepted choice of law principles in the foreign forum;

viii. Consent to enforcement of judgments entered in the foreign forum against assets of the defendants in US; and

QUESTIONS PRESENTED – Continued

ix. Consent that if all dismissed claims cannot be prosecuted or conditions not met in the foreign forum, the dismissed claims can be restored in US.

4. A fundamental question in these circumstances for international civil litigation is: Does the filing date of a pending suit in the United States lead to suspension of and control the period of limitations in foreign courts even if ultimately jurisdiction is denied in the US and at a time when all applicable statutes of limitations have expired in the alternate forum?

5. What, if any, of the above conditions should be required in the event a claim is being considered to be transferred from the US Court where the claim was brought to a foreign Court where others believe the claim should be?

6. What consideration, if any, should be given to the independence of the judiciary in the alternate forum especially with regard to a highly polarizing incident, as is at issue here, where in the forum being advocated for, there is extreme interest in the matter before the Court by the government in that alternate forum, and for which there is evidence of unacceptable influence on the outcome of case?

LIST OF PARTIES

The names of the Petitioners are:

GEIER, Hermann, survivor of Nov. 11, 2000 Kaprun fire; GÖTZ, Birgit, survivor of Nov. 11, 2000 Kaprun fire; GÖTZ, Erwin, survivor of Nov. 11, 2000 Kaprun fire; MAYERHOFER Roland, survivor of Nov. 11, 2000 Kaprun fire; MAYERHOFER, Elaine, survivor and relative of Karl and Barbara Mayerhofer (both killed in Nov. 11, 2000 Kaprun fire); STADMAN, Joop H., father of Barry Stadman (killed in Nov. 11, 2000 Kaprun fire); HILTEL, Manfred, survivor of Nov. 11, 2000 Kaprun fire; HILTEL, Markus, survivor of Nov. 11, 2000 Kaprun fire; KRAUS, Thomas, survivor of Nov. 11, 2000 Kaprun fire; MAYERHOFER-KARG, Maria, mother of Karl Mayerhofer (killed in Nov. 11, 2000 Kaprun fire); WOLF, Agnes, survivor of Nov. 11, 2000 Kaprun fire.

The names of the Respondents are:

Omniglow Corp; Omniglow L.P.; Omniglow Management LLC.; Sciens Capital Partners; GMS Acquisition Partners; Cyalume Technologies, Inc.; Omniglow LLC; Hydac Technology Corp.; Siemens Transportation Systems, Inc.; AG Bosch Rexroth Corporation; Omniglow Limited Partners of NY; WIKA Instrument Corporation; Exxon-Mobil Corporation.

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I. U.S. Court of Appeals for the Second Circuit; *Hermann Geier, et al v. Omniglow Corporation*; Denial of Rehearing or Rehearing *en banc*. March 5, 2010 Order. Reprinted as Appendix I.

II. U.S. Court of Appeals for the Second Circuit; *Hermann Geier, et al v. Omniglow Corporation* December 21, 2009 Summary Order. Reprinted as Appendix II.

III. U.S. District Court for the Southern District of New York: U.S. District Court's Grant of *forum non conveniens* Motion to defense, June 19, 2007, 499 F.Supp.2d 437. Reprinted as Appendix III

STATEMENT OF JURISDICTION

Jurisdiction is appellate jurisdiction by timely appeal from the decisions, summary order, and denial of rehearing, from the Second Circuit Court of Appeals, under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Statutory or constitutional basis is by conflicting decisions within the several Circuit Courts of Appeals and within the Second Circuit itself on a discretionary issue based on the common law principle of *forum non conveniens*. There is thus need of a uniform set of standards where in a multidistrict

litigation where many of the individual actions would have had the opposite result had they not been consolidated in a single District in a single Circuit, a necessary set of standards would have prevented the injustice that has instead ensued.

PRELIMINARY STATEMENT

These 150 Petitioners are comprised of the majority of the dozen survivors and also the immediate family members of many of the victims who perished in the Kaprun Ski Train Fire disaster occurring on November 11, 2000.

These Petitioners appeal to this Court, truly of last resort, after a decade of heartbreak, frustration, and sorrow, combined with deception, cover-up, corruption and the by-product that they were doubly victimized. First, they were victimized by the horror of the memories for the 12 survivors, their horrific injuries, both physical and psychic, and for the families of those who did not survive the loss of loved ones. The second victimization came as they saw collusion between the defendant operators and builders of the train and its parts and the Austrian Authorities to deny the wrongdoing and spare any loss of confidence in the Austrian Ski Tourism Industry at all costs.

At first, this was not so obvious, numerous actions were being filed in all parts of the United States, ultimately 20 in all by various sets of the

Petitioners, and then they were consolidated in the Southern District of New York before Judge Shira A. Scheindlin. The next stage was to propose a class action since all of the claims were common to all the claimants. An "opt-in" class action was chosen, as might be chosen in an employment situation where only those who felt they were discriminated against might become claimants. The District Court certified the class as such but the Respondents appealed that decision. The Second Circuit decertified the class, but then Class Counsel petitioned for a writ of certiorari from this Court to reverse the decertification of the opt-in class, *Certiorari* was denied.[1]

Thereafter, groups of Petitioners went their own way. Class Counsel said that they no longer represented any but a few of their original and chosen Petitioners, and those Petitioners were able to settle their claims with several of the defendants. By the time the majority of the Petitioners were again represented there were two additional developments.

It was announced that a Kaprun Commission was being set up, and with the loss of the members of the group who settled, the above Petitioners' claims in the MDL began to be picked off either on jurisdictional grounds or for *forum non conveniens*. The Kaprun Commission was run like an old boy's network, all conspiring together how to prevent the truth

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[1] *Kern v. Siemens Corp.*, 544 U.S. 1034 (2005) (NO. 04-1294).

from emerging, all to maintain concealment. If the Commission amassed voluntary contributions from the culprits who modified the heaters, who placed them immediately above the fuel lines where it was certain that the fuel would ignite, and those who grossly under-insured as to the liability coverage that was needed to operate a Ski Resort which sought to attract a world-clientele, maybe the violation of safety regulations and of Austrian insurance law would remain hidden. Not only were the amounts put up for the Commission so meager, but the Austrian Government itself withdrew some 10 million EUROs (as soon as the Second Circuit affirmed the *forum non conveniens* decision), leaving not even enough to quell the uproar for investigation. Those funds which were distributed were so inequitably and haphazardly allotted that many of the Petitioners herein, refused to participate and returned the un-negotiated checks to the maker.

Meanwhile the clock was running out on the Statute of Limitations in Austria; the actions in the U.S. were being attacked by defendants on *forum non conveniens,* and it was becoming ever more apparent that there was no adequate alternate forum in Austria. There is at present no adequate alternate forum in Austria and there shall never be an adequate alternate forum in Austria as shall be seen for the developments herein described. The decision by the Second Circuit that Austria could serve as an alternate forum, lacks consistency with the other circuits; lacks any set of standards or criteria that could have

led to a fair and just solution, and negates the justice and closure that these 150 Petitioners cry out for, at long last, to bring them a just closure, and peace with dignity and fairness.

FACTUAL CHRONOLOGY JUNE 2007 – APRIL 2010

When The Honorable Shira A. Scheindlin made the decision that Austria is a fair forum, Her Honor did not know many very important things, which we are just learning little by little with the help of the two experts, DI Keim and Dr. Schrettenbrunner. The Petitioners and their Austrian counsel Gerhard Podovsovnik, learned this as follows:

Impact of Judge Scheindlin's Decision

After the Decision: that Austria was an adequate forum, Austria withdrew 10 million EUROs from the Commission funds. That decision in June 2007 precipitated that the State Enterprises (the principal owner of the cable car) withdrew 10 Million EUROs from the Commission because it no longer faced liability in the U.S., ergo, no exposure, no money.

Heilbronn Prosecutor's Report: "fire on the roof" in Austria

When the Heilbronn Prosecutor's Office on the 25th of September 2007 issued its final report, the Salzburg Prosecutor started the investigations to restart the criminal cases. There was a "fire on the

roof" in Austria was its conclusion. Suddenly the Commission called in a final meeting for the 6th of November 2007. In this Commission meeting there was considerable pressure on the lawyers present, they had to respond "yes" or "no," in principle, if their plaintiffs were willing to settle for the 13.2 Million EUROs offered or not. If they refused that offer, they were told that there would not be another. There was still the hope that the Salzburg Prosecution Office would reopen the cases, so not all lawyers agreed to the settlement; some said maybe.

Immediately After Commission Meeting, the Criminal Inquiry Was Closed

To ensure that all hope died, the Minister of Justice ordered that the criminal inquiry be closed on the 7th of November 2007. By this action, the state defrauded the Petitioners first, and they were then betrayed by the Commission as well. The Commission that was looked toward for fairness, could have, should have, made a fair decision, but did not. In only one month and 13 days it is not possible to investigate everything that was produced by the Heilbronn Prosecutor and the experts in Heilbronn. There were no prosecutions and no expert opinions. The Petitioners lost hope and they accepted the Commission Settlement.

30th of April 2008: Coercion to Sign the Commission Settlement

On the 30th of April 2008, the Petitioners were coerced to sign the Commission Settlement. There

was no knowledge that there was considerably more insurance money available. GBK had in its insurance pool an additional amount of 88 Million EUROs. If Petitioners would have known this they would have never signed the Commission Settlement and in the end many of the Petitioners rejected the payments and sent the money back in outrage of the unfairness.

16th of April 2008: Keim/ Schrettenbrunner's New Criminal Filings Unknown to Petitioners

On the 16th of April 2008, Keim and Schrettenbrunner started to file new criminal complaints in Austria. They thought that the technical issues were absolutely clear and that they would prevail through their new technical findings very easily. The Kaprun Petitioners did not know anything about the new evidence. If they would have known, they would have never signed the Commission Settlement. But the State knew these things and failed to inform the Petitioners. The State has hidden the evidence from the Kaprun Petitioners. This is State fraud firstly and Commission fraud secondly. The State should have stopped the Commission Settlement, because the Commission claimed that the settlement was a fair and adequate settlement. The State suppressed the new evidence in order to conclude the Kaprun incident and maintain control over its exposure re: a State owned Railway and the way the State conducts its business.

Late Autumn 2008/Kaprun Petitioners Become Aware of the New Criminal Complaints

The Kaprun Petitioners only began to hear of the new evidence in late autumn 2008 and they joined as Privatbeteiligte (interveners) the new criminal cases. By November 2009 some 20 new criminal complaints were filed in Heilbronn, Europol, BKA Wiesbaden, Salzburg, Linz, and Vienna.

March 2009/Fagan vs. Republic of Austria Filed

Sometime around March 2009 *Fagan vs. Republic of Austria*[2] was filed in New York and Petitioners joined this case along with the Japanese Petitioners who had withdrawn from the Commission Settlement before it was announced.

Until February 2009 Nothing Advanced in the Prosecutions in Austria

Until February 2009 nothing happened in the criminal cases. The prosecutor tried to get the four prior experts who, according to the Heilbronn Prosecutor's reports had inappropriate expertise for what they asserted they could testify to as revealed at the depositions.

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[2] *See Fagan, et al v. Republic of Austria, et al*, 2009 WL 1423338, S.D.N.Y., May 19, 2009 (NO. 08 CIV. 6715 LTS JCF).

Criminal Defendants File Motion that Salzburg Prosecutors are Biased

When these experts were recalled in February 2009, the criminal defendants filed a motion alleging the Salzburg Prosecutor's Office was biased and that the case should be transferred to Linz. The Ministry of Justice did so immediately. The only goal of the Linz Prosecutor, who was the Chief Prosecutor and the Minister of Justice, was to consider the statute of limitations in said transfer. No one except the Minister of Justice knew the date the statute of limitations would be a bar to further litigation. There was the rumor that it would be reached in June 2010.

June 2009: Depositions of Austrian Four Experts

In June 2009 the Prosecutor in Linz arranged four very brief depositions of the four experts. They were just deposed for a few unimportant questions and not more. The depositions were concluded very rapidly. One of the experts admitted that he has been nearly blind for 11 years. They still claim that they did everything right and did not know, that an electronic device loses its calibration when it is opened.

October 2009: Access to the Secret Prosecution Files is Denied

Then another lull until October 2009; Newspapers reported that there was a Prosecution Report to the main prosecution office and from the main prosecution office to the Ministry of Justice. Podovsovnik tried to get access to the files and

Podovsovnik was informed that these papers are part of the so called "secret prosecution" file (Tagebuch = diary). This is legally covered with a provision in the Austrian Prosecution Act (par. 35). Therefore, Podovsovnik requested to get a decision. Podovsovnik received the decision that said Podovsovnik could have no access. Podovsovnik then petitioned the 2nd circuit. The 2nd circuit ruled that it was the duty of the Prosecutor's Office under current law to deny my access; new legislation would be required to change the law. Until the law is changed, neither litigants nor lawyers shall have access to said secret files. Everything that is decided and is important, all papers, all documents are in this secret prosecution file. This cannot lead to a fair trial; therefore this is not a fair and adequate forum, where both parties have the same access to all information.

September 2009: GBK Files to Conclude Japanese Survivor Civil Case; Bad Faith of GBK

In September 2009 GBK filed a request to restart/finish the civil case of the Japanese Petitioners against GBK, because they were afraid of the new U.S. claim (*Fagan v. Republic of Austria*) and that a judgment from the U.S. could be brought to Germany and that it could be executed in Germany then be made valid for Austria, because of the provisions of European Union laws for civil rights and their enforcement. The judge granted the request and ruled that he will reopen the case but he limited the scope to the issue of whether the statute of limitations had

run out and if the Commission settlement is a *forum non conveniens* for the Japanese people to have to bring their claims to the Salzburg civil courts.

March 2010: Civil Judge Closes Case, Decision to Follow, Relief Denied

On the 18th of March 2010 he explained yes, it is a *forum non conveniens* and the U.S. case does not interest him.

November 2, 2009: The Ministry of Justice is Allowed to Stop Criminal Cases Again

Then, until November 2009 nothing happened in the criminal cases. There were no expert opinions, no witnesses were heard; nothing. On November 2nd 2009 the Prosecutor informed Podovsovnik that the criminal case is over. Podovsovnik was really shocked that this could be possible, because there is a plethora of new evidence, new expert opinions, and this all was absolutely ignored and nothing was scrutinized.

November 5, 2009: "Zeit" Article Reveals a Criminal Organization

Then on the 5th of November 2009 the article in the newspaper "Zeit" appeared that claimed that there had been a formation of a criminal organization and a secret agreement between the American victims and American companies and the German companies Siemens and Bosch and GBK, Generali and Republic of Austria.

November 13th, 2009: Keim and Schrettenbrunner File Criminal Complaint Against Prosecutor and Chief Prosecutor in Linz

Immediately after this, DI Keim and Dr. Schrettenbrunner filed a criminal complaint against the Prosecutor and Chief Prosecutor in Linz at the prosecution office in Heilbronn.

The Ministry of Justice was informed about this new complaint by Keim and Schrettenbrunner. Instead of changing the prosecution place from Linz to Vienna or another main prosecution office in Austria, it stayed in Linz. The Ministry of Justice did nothing (*vide supra* where the criminal defendants say Salzburg is biased and the Ministry of Justice changed immediately the place of prosecution). The biased Prosecutor and Chief prosecutor stayed in the case and did their work against victims' families.

November 19, 2009: Petition Against Final Decision to Conclude the Criminal Cases.

On the 19th of November 2009 Podovsovnik filed a petition against the final decision to close the case from 2nd November 2009. The Prosecutor in Linz then filed a "defendants'" brief instead of a prosecution brief. It really took the position of the defendants and offered no prosecution statements. The brief was totally biased.

January 2010: Keim and Schrettenbrunner Discovered Unbelievable New Evidence

The heater inside the Train was altered by GBK: The heater was changed inside by GBK before it was installed in the cable cars in 1994. It was not only opened and closed it was changed in a constructive and technical as well as electronic way. This is one of the main discoveries in the whole case. So GBK itself (as a state directed company) changed the heater and changed its inner workings. Without these changes, the heater would have never been on the cable cars because otherwise it would have never functioned.

Massive Biased Expert Commission: Suspects Comprised Much of the Panel

The central question in the criminal proceedings, if there was a documented incendiary flash fire in the cable car, was answered by an expert commission that was called in and installed by the Ministry of Transportation. This expert commission issued its final report on the 11th of December 2001 in the French language. This was then translated to German by the Ministry of Transportation. In the German version the name of one member of the Commission was not revealed. But everyone copied only the German version as far as we know, until now. The name that was missing in the German version was the name of Dr. Kühschelm. He was in the Ministry of Transportation. He was one of the highest officers responsible for cable cars and he made the decisions for the reconstruction of the cable

car. He was the person who had the responsibility to control and supervise the cable car. At the time when he was serving on the expert commission he was one of the suspects. Therefore, it is obvious why the expert commission came to the conclusion there was no incendiary flash fire in the cable car, although there were 360 liters of highly explosive and easily flammable petroleum based oil in the closed hydraulic system and the closed system of the tunnel. Dr. Kühschelm was also the President of the International Cable Car Organization (OITAF) that was sending its members (experts) to the experts commission. In that organization there were people sitting on the investigative commission who were in charge of the cable cars (Ing. Müller, Ing. Brennsteiner, individuals from TUV). This commission was really highly biased in its self-serving composition alone. And it was probing into the criminal case with a faked German translation to betray all the Kaprun Plaintiffs and their lawyers and the deception worked. All experts afterwards referred to the expert commission findings.

88 Million EUROs Additional Insurance Money was Available

The 88 Million EUROs additional insurance money for fire insurance from Uniqa, HDI and Vienna Insurance remained with this insurance and GBK as far as we know and was not touched, but hidden from the victims of Kaprun.

kV power circuit line/electric arc/brilliant sparkling blaze akin to fireworks

There was an 18 kV power circuit line in the tunnel, when the cable coating melted because of the initial fire, then there was an electric arc of a few thousand degrees Celsius that was in contact with the train chassis that was made of Magnesium and Aluminum. When there is a high enough initial fire (electric arc), then these materials burn in a brilliant sparkling blaze akin to fireworks of a greater magnitude heretofore ever seen, but in a quite confined and already very much heated space.

February 2010: Evidence Found in the Evidence Room of Salzburg the Courthouse

In February 2010 Podovsovnik, (the Austrian Attorney who was retained by Petitioners, early on) tried to find out if there was still evidence in the Salzburg Courthouse, because Podovsovnik was told that after the final decision of a criminal action is issued the judge can order that everything be destroyed. The train was destroyed as already reported to Judge Scheindlin. But Podovsovnik received information from the judge, that there was still evidence in the evidence room, e.g. the non-burned heater, the oil-reeking isolation material, the oil-reeking pieces of wood, the oil-reeking oil cans where the hydraulic oil is still liquid. Podovsovnik was granted access to this evidence in mid-February 2010, but Podovsovnik needed not only still photographs of the evidence, Podovsovnik needed video of it. Podovsovnik asked

the television station ATV if they would help him and assistance was granted. Podovsovnik received an allowance to make a film of the discovered evidence with the help of ATV. The quality of the film was not acceptable for it to be used forensically, thus Podovsovnik had to return a second time.

March 30th 2010/no Access to Evidence Room intervention of biased Chief Prosecutor

Podovsovnik was granted permission orally by the judge, but when Podovsovnik was in Salzburg with the television team of Bayrischer Rundfunk on the 30th of March 2010, Podovsovnik received the information that the (biased) main prosecution office filed a petition against filming the evidence and Podovsovnik was not allowed to go into the evidence room with the camera team. There is still the danger, that the judge will and can destroy the evidence anytime. Therefore we need an evidence preservation order.

April 2010: Podovsovnik Is Put on Notice of Disciplinary Charge by the Ministry of Justice

Starting in April 2010 Podovsovnik received a letter from his bar association, that he was being put on notice of a disciplinary charge that was filed by the Ministry of Justice. Podovsovnik had just sent newspaper articles to the Ministry of Justice, and for this they set him up on charges before the bar association. It would be urgently necessary to file new complaints in Austria against the Commission Settlement and

against Generali to get to know how the liability insurance money from the liability insurance policy was used. The amount paid out was originally 23.2 Million EUROs and by 2008 only 5.4 Million EUROs went to the victims. We do not know where the rest of the money was spent, but we would like to know how the rest of the money was used. We should file a new complaint against the State because of State liability in the entire process. But what the State will do with Podovsovnik as the last lawyer who is still fighting for Justice for the Kaprun victims, when the State is already bringing him up on charges before the bar association for merely sending newspaper articles to the Ministry of Justice, can only be imagined. Therefore, Podovsovnik is afraid of losing his law license in Austria if he takes further action against the Republic of Austria, domestically. Nevertheless, Podovsovnik filed a criminal complaint against the Ministry of Justice claiming coercion and attempted extortion for him to cease and desist. Three weeks have passed, there is still no file number, and no information will be given by telephone regarding the charges Podovsovnik filed.

April 23, 2010: Seiss Filed Lawsuit Against Anton Muhr (an Early Austrian Expert)

As far as was reported in newspaper article, the former judge of the Kaprun proceedings has now entered criminal charges against a former expert in the Kaprun process, Mr. Anton Muhr before the main prosecution office in Linz, and also the reporter of the

newspaper Zeit was charged by Seiss at the main prosecution office in Linz.

End of March 2010 • Statute of Limitations Runs Out

Now the Ministry of Justice has waited so long that the statute of limitations ran out at the end of March 2010. This was reported by the Ministry of Justice to APA on Friday 23rd of April 2010. In this way, they have managed to arrange that nothing more is possible in Austria as to criminal charges. We do, however not believe that this is true, because firstly, as mentioned above (re: the heater changes), is a cause for a new criminal complaint, that had been committed by GBK and its officers who intentionally made changes to a piece of equipment, that directly ensured that any fire would turn into an explosion that would and did cause the death of almost everyone on the train rather than a small containable one. These elements of crimes cannot be over, because there is legally no statute of limitation on homicide, but Podovsovnik does not dare to file such a complaint in Austria, because Podovsovnik is afraid to lose his law license.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Ruling Stands Apposite to its own prior holdings, to those of the other Circuits and are inconsistent with the rulings of this Court

The 150 "Kaprun Victims, Survivors and Families" respectfully submit, pursuant to jurisdiction of the Court, that the Court should grant a writ of certiorari. In its December 21, 2009 Summary Opinion the Court upheld a judgment of the United States District Court for the Southern District of New York (Scheindlin, J.), which dismissed this action on *forum non conveniens* grounds.[3] The Court should grant the Petition because:

i.) The Second Circuit's Summary Order misapprehended law and facts on Petitioners' purported waiver and review will prevent manifest injustice[4] to

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[3] The Summary Order is attached. Judge Scheindlin's Order is Dkt # 297 in 01-md-1428 as reiterated in the cases below; *see* Appendix A-DD.

[4] A manifest injustice will result if this Court does not review how as of July 11, 2007 the District Court rejected Respondents' waiver arguments and recognized Austria was not an adequate alternate forum because (i) there was no waiver of jurisdictional or statute of limitations bars, (ii) Respondents refused to waive statutes of limitations and refused to consent to jurisdiction in Austria, (iii) there was an absolute bar to refiling of claims in Austria, (iv) the District Court's original analysis was "100% upside down" and all claims could not be refiled in Austria, (v) although claims were timely in the U.S. because of *American Pipe* tolling or United States filings prior to the expiration of the three year U.S. statute of limitations, the

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permit consideration of legal issues, i.e., statutes of limitations and other jurisdictional bars;

ii) As explained, the Second Circuit's conclusion that Petitioners waived any arguments that statutes of limitation or jurisdictional bars existed is unfounded, misapprehends facts and contradicts the record, including submissions and hearing transcripts from 2005 to 2007, and Appellees' arguments that were expressly rejected in July 2007 by the District Court related to waiver and limiting subjects on reconsideration, after issuance of the June 19, 2007 Order, and, which the District Court characterized as "procedural niceties" that did not forward the interests of "justice";

iii) The Summary Order improperly revives arguments that were specifically rejected by the District Court in July 2007, to justify and defend errors with regard to whether or not a foreign forum was actually available;

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statutes of limitations had expired in Austria for all claims against Respondents, (vi) American courts cannot acquire jurisdiction over all claims and (vii) a judgment from Austrian Courts could not be enforced against U.S. respondents from October 2007 forward as these issues were back and forth between District and Circuit Court, Petitioners sought to have the *forum non conveniens* dismissal order reversed, which the District Court itself recognized needed to be reversed or modified in the interests of "justice." The cases below are included as items in the Appendix.

iv) The District Court's dismissal and Appellate Court's Affirmation must be reversed, with the instruction that it be re-entered with conditions that Respondents waive statute of limitations defenses and consent to jurisdiction in Austria, and other necessary conditions ensuring Petitioners would be able to proceed with their claims should the conditions not be met;

v) The Summary Order misapprehends the law and facts regarding the adequacy of an Austrian forum for Kaprun claims and the need to correct the manifest injustice, errors and misapprehensions resulting from the Court's failure to (a) consider objective evidence of bias and incompetence by Austrian Courts' handling of Kaprun claims that led to public criticism and ridicule of the Austrian judiciary related its handling of Kaprun claims (in part because of undue influence exerted by the Republic of Austria, co-owner of Kaprun facility, with vested interests in alpine tourism and an interested party in Kaprun claims) and (b) failure to consider bias issues as a related part of the 1st prong of the *Gilbert*[5] and *Piper*[6] analysis (the existence of an impartial alternate forum) rather than just in second prong analysis related to private and public interest factors and errors or misapprehensions in the review of *forum non conveniens* motions at trial and appellate levels,

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[5] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

[6] *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

which require a more general reversal of the District Court's decision and the Second Circuit's affirmance;[7]

vi) The Summary Order involves important matters of law in need of this Court's clarification, justifying grant of a Writ of Certiorari with invitations to affected government representatives to participate as *Amici as done in Iragorri*;[8]

vii) The Summary Order involves questions of exceptional importance – in a case started as a class action,[9] should a decision to dismiss foreign Plaintiffs' de-certified class claims, based on alleged *forum non conveniens,* be issued without ensuring the protections of statute of limitations tolling under *American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974), without mandatory conditions to protect parties opposing similar motions and which would ensure compliance with the Court's standard in *Gilbert, Koster v. Lumbermen's Mutual Casualty Co.*, 330 U.S. 518 (1947),

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[7] *See Burnette v. Carothers,* 192 F.3d 52 (2d Cir. 1999); *Lo Duca v. United States,* 93 F.3d 1100 (2d Cir. 1996); *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295 (2d Cir. 1996); *Coogan v. Smyers*, 134 F.3d 479 (2d Cir. 1998); *Baker v. Dorfman*, 239 F.3d 415 (2d Cir. 2000); *Booking v. General Star Management Co.*, 254 F.3d 414 (2d Cir. 2001); *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90 (2d Cir. 2005); *Allianz Insurance Co. v. Lerner,* 416 F.3d 109, 114 (2d Cir. 2005); and *Bogle-Assegai v. Connecticut,* 470 F.3d 498 (2d Cir. 2006).

[8] *Iragorri v. International Machine Elevator Inc.*, 203 F.3d 8 (1st Cir. 2000).

[9] The case involved U.S./foreign plaintiffs and U.S./foreign company and sovereign defendants.

and *Piper* that an adequate alternate forum actually exists;[10]

viii) Errors in the Summary Order from the Second Circuit present an exceptional opportunity for the Supreme Court to establish precedent to be followed in future cases that would bring the several Circuits[11] to a unified standard requiring that

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[10] The types of conditions should include (i) consent to jurisdiction in foreign forum; (ii) consent that all dismissed claims can be heard in the alternate forum; (iii) waiver of statute of limitation defenses or other objections to hearing of dismissed claims in the foreign forum; (iv) consent to service of process and taking of evidence in accordance with the Hague Convention on Service of Process and Taking of Evidence in the proposed foreign forum (whether or not a signatory to the Hague Convention); (v) consent to production (at cost) of defendants' witnesses and evidence; (vi) consent to imposition of generally accepted choice of law principles; (vii) consent to enforcement of judgments against assets in U.S. and (viii) consent that in the event of claims dismissal, all dismissed claims that cannot be prosecuted in the alternate forum can be restored in U.S. Courts.

[11] The Second Circuit is probably the country's most active in *forum non conveniens* jurisprudence yet it is not in sync with 1st Circuit – *Iragorri v. International Machine Elevator Inc.*, 203 F.3d 8 (1st Cir. 2000); 3rd Circuit – *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38 (3rd Cir. 1988); 4th Circuit – *Kontoulas v. A.H. Robins Co.*, 745 F.2d 312 (4th Cir. 1984); 5th Circuit – *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208 (5th Cir. 2000); 6th Circuit – *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984); 7th Circuit – *Kamel v. Hill-Rom Co.*, 108 F.3d 799 (7th Cir. 1997); 8th Circuit – *Reid-Walen v. Hansen*, 933 F.2d 1390 (8th Cir. 1991); 9th Circuit – *Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656 (9th Cir. 2009); 10th Circuit – *Rivendell Forest Products, ltd. v. Canadian Pacific ltd.*, 2 F.3d 990 (10th Cir. 1993); 11th Circuit – *Magnin v. Teledyne*

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conditions to dismissals on *forum non conveniens* grounds where the proposed forum is in a foreign country, and which would require that any such dismissal would include specific conditions to ensure that an alternate forum actually existed to wit: where (i) all claims could be re-filed, (ii) statutes of limitations defenses were waived, (iii) consent to jurisdiction was given and (iv) consent to enforcement of foreign judgments in U.S. was provided;

ix) The Summary Order by the Second Circuit conflicts with this Court's standards in *Gilbert, Koster* and *Piper*[12] by affirming a District Court Order that failed to conduct proper two-step process by first determining if an adequate alternative forum actually existed (i.e., that Respondents are amenable to process and no bars exist to foreign forum's exercise of jurisdiction over all re-filed claims) before a *forum non conveniens* dismissal was granted;

x) The Summary Order conflicts with other decisions in the Second Circuit[13] involving cases

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Continental Motors, 91 F.3d 1424 at 1430-31 (11th Cir. 1996); and DC Circuit – *El Fadl v. Central Bank of Jordan*, 75 F.3d 668 (C.A.D.C. 1996).

[12] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Koster v. Lumbermen's Mutual Casualty Co.*, 330 U.S. 518 (1947) and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

[13] *See Calavo Growers of California v. Generali Belgium*, 632 F.2d 963 (2d Cir. 1980); *In Re: Union Carbide Corp. Gas Plant Disaster at Bhopal India*, 809 F.2d 195 (2d Cir. 1987); *Borden, Inc. v. Meiji Milk Products Co.*, 919 F.2d 822 (2d Cir. 1990), cert. denied, 500 U.S. 953 (1991); *Blanco v. Banco Indus.*

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interpreting the adequacy of a proposed alternate forum and requiring imposition of conditions to any proposed dismissal and cases interpreting adequacy of a proposed alternate forum and in some instances denying dismissals[14] and (ii) decisions in other Circuit Courts involving *forum non-conveniens* considerations and conditions to dismissal.[15]

II. The Second Circuit's Decision not only stands apart from the standards of this Court, those of the other Circuits and its own prior rulings, but if not reversed will cause manifest injustice

From 1982 through the present, the Second Circuit Court of Appeals decided more than 40 appeals of District Court decisions either granting or

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de Venezuela, S.A., 997 F.2d 974 (2d Cir. 1993); *Sussman v. Bank of Israel*, 990 F.2d 71 (2d Cir. 1993) (per curiam); *Moscovits v. Magyar Cukor Rt.*, 34 Fed. Appx. 24, 2002 WL 992339 (2d Cir. 2002); *Florian v. Danaher Corporation*, 69 Fed. Appx. 473, 2003 WL 21431180 (2d Cir. 2002); *Saab v. Citibank NA*, 50 Fed. Appx. 467, 2002 WL 1317708 (2d Cir. 2002); *USHA (INDIA), ltd. v. Honeywell Int'l*, 421 F.3d 129 (2d Cir. 2005).

[14] *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Iragorri v. United Techs. Corp.*, 274 F.3d 65 (2d Cir. 2001) (en banc); *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163 (2d Cir. 2001); *Bank of Credit and Commerce International (Overseas) Limited v. State Bank of Pakistan*, 273 F.3d 241 (2d Cir. 2001); *DiRienzo v. Philip Services Corp.*, 294 F.3d 21 (2d Cir. 2001) (en banc); and *Gross v. British Broadcasting Corp.*, 386 F.3d 224 (2d Cir. 2004).

[15] *See* note 10.

denying motions to dismiss on the grounds of *forum non conveniens*. It affirmed the overwhelming majority of those decisions, reflecting the broad discretion given to the District Courts in such matters. *Iragorri v. United Techs. Corp.*, 274 F.3d 65 (2d Cir. 2001) (*en banc*), decided almost a decade ago, was the last *en banc* hearing on *forum non conveniens*, and involved issues of balancing of private and public interest factors to determine the weight to be accorded a plaintiffs' choice of forum. Since then, the District Courts have been faced with hundreds of motions to dismiss based on *forum non conveniens*, and scores of those have come before the Second Circuit Court of Appeals. Yet, no case came before the Second Circuit Court of Appeals that presented as many important legal issues as those contained in Petitioners' appeal to that court. This Court can and should apply the legal and equitable principles within its power to ensure that the disposition of this matter is consistent with *Gilbert* and *Piper*. This Court has in this petition the opportunity to utilize the specific questions presented and issues faced by these Petitioners, to establish a uniform precedent, ensuring that future District Court judges and Circuit Court Panels, faced with motions to dismiss based on *forum non conveniens* grounds and to provide the needed framework with a specific set of conditions that must be met in any such dismissal. Such precedent would ensure consistency among the Circuits. Such a precedent would also protect the rights of future litigants, who are properly before any Circuit Court to render

consistent decisions within the same Circuit as well, and whose claims face potential dismissal in favor of litigation in foreign courts.

This Petition involves claims of foreign Petitioners, formerly members of a class that was de-certified and to which U.S. tolling provisions (to wit: *American Pipe*) would ensure their claims were timely. The proposed alternate forum (Austria), however, does not recognize tolling of claims originally filed in the U.S., and therefore any claims re-filed in Austria would be time-barred. In this case, these U.S. Respondents argue in favor of dismissal of Petitioners' claims that have been pending and litigated in the U.S. dating back to 2001 notwithstanding the fact that (i) Respondents admit, and in fact argue, that Petitioners' claims would be barred due to expiration of Austria's statute of limitations and other jurisdictional bars, (ii) there is irrefutable evidence that all claims dismissed from the U.S. forum could not be re-filed in Austria, (iii) Respondents have refused to consent to appropriate conditions that if the dismissed claims could not be re-filed and are in fact "dead on arrival" in Austria, they could be restored in the U.S. and (iv) Austrian government and Austrian Justice Department officials have announced that the dismissed claims could not be re-filed. This case further presents a legal issue that should be decided by this Court, related to (i) whether substantive or "merits" legal issues allegedly waived can and should be heard by the reviewing court and (ii) establishment of precedent to be followed in future cases involving *forum*

non conveniens motions to dismiss in favor of a foreign forum, and which should require that any future dismissals include specific conditions that all claims can be re-filed, and that no bars to prosecution or jurisdiction exist, in the foreign forum.

The case involves issues of substantive law which on their face appear to discriminate against Plaintiffs from several foreign countries (with U.S. Plaintiffs in the same Kaprun MDL cases – 01-md-1428 – involving the same accident whose claims were not dismissed), who sued U.S. and foreign companies, governmental agencies and company defendants in U.S. Courts[16] and who were then confronted with these Respondents' reverse forum shopping arguments after 9 years of litigating the cases in the U.S., first as a class action and then as individual actions after the 2005 de-certification of the class by this Court.[17]

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[16] Cases were not filed here as forum shopping, the original claims were class actions involving U.S. plaintiff victims and the U.S. Courts are the only jurisdiction where all Plaintiffs can be sued in a single Court and there were bars to certain claims in Austria.

[17] It was impossible to provide both all the opinions below and the transcripts, of in court statements from all the conferences in which defendants (Respondents here) make averments contrary to facts, that demur from submitting papers which they are asked to do to substantiate their statements. Such conduct in itself should serve as a waiver of the right to any affirmative relief. If certiorari is granted then the full record on appeal as relevant to this issue shall support the briefs to be filed.

Certiorari should be granted (i) to consider the obvious impact the Summary Opinion will have on the litigation of a wide range of international disputes, (ii) because the Summary Order misapprehended certain fundamental facts and law, related to existence of an alternate forum and issues related to potential waiver of legal arguments and (iii) because the decision departs from holdings of this Court regarding appellate review of *forum non conveniens* decisions. To paraphrase Judge Cabranes in another forum dismissal case "*[i]f this Summary Order stands (which it should not) it will create a new doctrinal approach invented today, that will govern future lawsuits*" in which some Petitioners reside in the U.S. and others reside outside the U.S. This Court should grant certiorari to consider – and reverse – a Summary Order that represents a significant departure from *forum non conveniens* jurisprudence of both the Second Circuit Court of Appeals, or any other Circuit that empirically rules on *forum non conveniens* issues without a set of standards and thus makes inconsistent rulings intramurally and then enunciate the steps this Court intends to guide all courts to abide in reaching their decisions.

III. The Summary Order Misapprehended Facts & Law

The Summary Order of the Second Circuit is predicated upon an unfortunate misapprehension of facts to a great extent because Respondents have disingenuously tailored their briefs, not to the law

and not to the facts, but to whatever suits them with regard to a particular argument. Respondents' postures related to the existence and adequacy of an alternate forum, or lack thereof, should not be countenanced.

1. There is No Waiver of Statute of Limitations & Jurisdiction Arguments

The Second Circuit's Summary Order states that Petitioners waived statutes of limitation arguments by not raising them in the District Court, and as such a reviewing Court could not consider such an issue. Any conclusion that Petitioners waived issues concerning expiration of statute of limitations or jurisdictional bars in Austria is unfounded, is a misapprehension of fact, and is extensively contradicted in the case record. Petitioners did not waive the statute of limitations argument; they made the arguments related to statute of limitations that outlined when claims would expire, and did so, multiple times, beginning as early as November 2005, continuing in 2006, and multiple times in 2007. Respondents mischaracterized Petitioner's April 2007 arguments regarding timeliness in *New York* claims already filed, made in response to Respondents' 2-part motion to dismiss, the second part of which alleged that Petitioners' *New York* claims were untimely. Respondents make misleading and patently false arguments that Petitioners' position regarding *New York* somehow translated to a position that claims would be timely upon re-filing in *Austria*. That was never Petitioners'

position. It was not clear to the District Court from the parties' own 2007 arguments what import the Austrian three-year statute of limitations would have and what other potential jurisdictional bars existed in Austria. On June 18, 2007 the District Court e-mailed the parties requesting they provide clarification by June 20, 2007. Only Petitioners responded and they did so in a timely fashion with an expert declaration of Dr. Ivo Greiter. The District Court then further explored issues regarding statutes of limitations and jurisdiction during the July 11, 2007 conference, where The District Court explicitly rejected Respondents' waiver argument, and pointed out the obvious difference between timeliness in New York "claims filed years ago" and Austria. The District Court also explicitly rejected the proposition that these arguments may not be made on reconsideration. The District Court also then discussed that if claims might be time-barred, the dismissal should be conditional. As of July 11, 2007, the District Court realized that it may have overlooked important issues that it sought to have answered, but ultimately misconstrued, incorrectly assuming that pendency of *any* Petitioners' claim in Austria (Petitioners sued only one defendant – the Austrian entity GBK) preserved the statute of limitations for *all* claims, and without waiting for Plaintiffs' full response. This error by itself, extinguishes claims of 150 persons in the instant case and should not be considered due to misleading, inaccurate and previously rejected "waiver" arguments. Finally, to the extent there was any such waiver, the Summary Order misapprehends the

authority a reviewing Court has to consider purely legal arguments (i.e., statute of limitations, jurisdiction and existence of alternate forum) in the context of a *forum non conveniens* dismissal and the *Gilbert, Koster* and *Piper* tests and conflicts with the Court's decisions on waiver. The Court has explained waiver to be a rule of prudence, not of appellate jurisdiction, and the reviewing Court retains broad discretion to consider issues not raised initially in the District Court where (i) consideration is necessary to avoid manifest injustice or (ii) the issue is purely legal and there is no need for additional fact-finding.[18]

2. Statute of Limitations in Foreign Forum Expired

From 2006 forward Respondents (i) have taken the position that statutes of limitations in its proposed alternate forum (Austria) expired on Petitioners' original claims, (ii) have confirmed that Austria does not recognize or accept tolling of claims filed in the U.S. and (iii) have asserted that Austria's statutes of

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[18] *See Baker v. Dorfman*, 239 F.3d 415 (2d Cir. 2000); *Lo Duca v. United States*, 93 F.3d 1100 (2d Cir. 1996); *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295 (2d Cir. 1996); *Coogan v. Smyers*, 134 F.3d 479, 487 (2d Cir. 1998); *Booking v. General Star Management Co.*, 254 F.3d 414 (2d Cir. 2001); *Merrill Lynch & Co., Inc. v. C.I.R.*, 386 F.3d 464 (2d Cir. 2004); *Bogle-Assegai v. Connecticut*, 470 F.3d 498 (2d Cir. 2006); *E.H. v. Board of Educ. of Shenendehowa Central School Dist.*, Slip Copy, 2009 WL 3326627 (2d Cir. 2009).

limitations to be applied in New York had expired on all of Petitioners' original claims.

On Aug. 4, 2006, Petitioners submitted a table of the then pending cases, with Respondents named in each case and the statute of limitations for each, as applied to the New York filings. As of June 2007, the Austrian statutes of limitations had already expired for Petitioners' claims that had been filed in the U.S., as against Respondents. The Greiter Declaration, which was unrebutted by Respondents, confirmed that the Austrian statutes of limitations expired on Petitioners' original claims and that the claims could not be re-filed in Austria.[19]

Prior to the Dec. 16th Oral Argument before the 2nd Circuit Court of Appeals, Petitioners submitted an updated Declaration that (i) confirmed the expiration of Austrian statutes of limitations, inability to exercise jurisdiction in Austria and inability to re-file claims in Austria and (ii) provided the public statements by Austrian judicial and Ministry of Justice officials and representatives that the applicable statutes of limitations had already expired and dismissed claims could not be re-filed/prosecuted in Austria.

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[19] Information on Austrian statutes of limitations and potential jurisdictional bars, explained in The Greiter Declaration, was requested by the Court prior to its issuance of the June 19, 2007 Order and the Greiter Declaration appears to be among 109 documents missing from the Court file.

Therefore, Respondents fail to satisfy their burden of the first prong of the *Piper* test requiring that a forum actually exists in which all the dismissed claims can be re-filed and prosecuted. Respondents openly acknowledge that the applicable statutes of limitations have expired in the proposed alternate forum – Austria – and refused to waive this defense. Respondents' own position on the Austrian statute of limitations guarantees their failure to satisfy their burden of the first prong of the *Piper* test, and is irrefutable proof that no adequate alternate forum exists. In fact, it is Respondents who have, in effect, "waived" the first prong of *Piper* by arguing the Petitioners' claims would be untimely in *either* Austria or New York, which argument would be sustainable only if Petitioners were actually out of time in New York. However, Petitioners' claims were timely in New York as the Court noted in the August 2006 Conference and then allowed Amended Complaints. Yet, the Court did not "reach" the statute of limitations issue at all in its forum dismissal.

3. Respondents Refused to Consent to Jurisdiction in Austria

From 2006 forward, Respondents repeatedly refused to consent to jurisdiction in Austria. At the December 16, 2009 Oral Argument before Circuit Judge Cabranes, when asked by the panel, Respondents refused to consent to jurisdiction in Austria and continued to assert the statutes of limitations precluded the claims in Austria. By their refusal to

consent to jurisdiction in the foreign forum, Respondents again fail to satisfy the first prong of the *Piper* test and all of the cases in the Second Circuit, and by this Court requiring that a forum actually exists in which all the dismissed claims can be re-filed and prosecuted.

4. Claims Cannot be Re-Filed in Austria

As the District Court recognized (but failed to *sua sponte* correct) as of July 11, 2007, as The Greiter Declaration proves, as Respondents themselves admitted, as the Motions to Augment the Record, and as the December 11, 2009 Podovsovnik Declaration confirms, there is no jurisdiction in Austria over the Petitioners' dismissed claims, because (i) Austrian statutes of limitations expired, (ii) Austrian Courts cannot acquire jurisdiction over all dismissed claims and (iii) Austrian judicial officials and representatives of the Ministry of Justice have publicly stated the dismissed claims could not be re-filed or prosecuted in Austria. Therefore, Respondents have not satisfied and cannot satisfy the first prong of the *Piper* test and precedent in the Second Circuit and this Court's holdings, as no forum in Austria exists where all dismissed claims can be re-filed and prosecuted.

REASONS CERTIORARI SHOULD BE GRANTED

1. There are discrepancies between the several Circuit Courts of Appeals as to grounds for granting and dismissing *forum non conveniens* motions that requires the Court to set a single standard.

2. The Second Circuit which has the most active *forum non conveniens* jurisprudence is out of step with all the other circuits where their decisions show that Respondents would likely have denied the relief that is so manifestly unjust to the Petitioners.

3. Even within the Second Circuit there are no set standards or uniformity and Petitioners and their attorneys can invest years of hope and labor and great resource investment without being able to predict an outcome or enunciate a standard by which their claims will be administered.

4. The Second Circuit in the present case has not complied with the Court's guidance in *Piper, Gilbert* or *Koster* causing manifest injustice in this MDL case, which if not consolidated in a Second Circuit district, would have been successfully litigated some time ago.

5. Both because of discrepancies and disparities among the 11 Circuit Courts of Appeals and within the Second Circuit itself, guiding principles or rules need to be formulated by this Court in order to have uniformity of outcome throughout the nation.

6. Especially because tolling in U.S. does not lead to tolling in foreign courts, the decertification of a prior class action and the lack of legal uniformity and standards described in 1-5 immediately above has been devastating to the 150 Petitioners when Respondents propose an alternate forum that no longer exists unless they waive timeliness defenses which they refuse to do while simultaneously advocating for the alternate forum.

CONCLUSION

Petitioners therefore pray this Petition be granted certiorari (i) to correct errors or misapprehensions of fact and law as interpreted by the Second Circuit, (ii) to prevent the "manifest injustice" that results from the Summary Order of the Second Circuit that would dismiss all claims that were pending in the lower Courts since 2001 to send them to a foreign forum where they are "*Dead on Arrival*" and (iii) so issues of international importance can be addressed and future Circuit and District Courts may be given specific conditions to be imposed before future litigants are sent to foreign forums where jurisdictional bars to prosecution or re-filing exist or from which

judgments are unenforceable against U.S. defendants.

New York, New York
December, 2010

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 32.1 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." A party citing a summary order must serve a copy of that summary order together with the paper in which the summary order is cited on any party not represented by counsel unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at http://www.ca2.uscourts.gov/). If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500

Pearl Street, in the City of New York, on the twenty-first day of December two thousand and nine.

PRESENT:

JOSÉ A. CABRANES,
BARRINGTON D. PARKER,
*Circuit Judges.**

HERMAN GEIER, survivor of Nov. 11, 2000 Kaprun fire, BIRGIT GOTZ, survivor of Nov. 11, 2000 Kaprun fire, ROLAND MAYERHOFER, survivor of Nov. 11, 2000 Kaprun fire, JOOP H. STADMAN, father of Barry Stadman killed in Nov. 11, 2000 Kaprun fire, ERWIN GOTZ, survivor of Nov. 11, 2000 Kaprun fire, MANFRED HILTEL, survivor of Nov. 11, 2000 Kaprun fire, MARKUS HILTEL, survivor of Nov. 11, 2000 Kaprun fire, THOMAS KRAUS, survivor of Nov. 11, 2000 Kaprun fire, ELAINE MAYERHOFER, survivor and relative of Karl and Barbara Mayerhofer (both killed in Nov. 11, 2000 Kaprun fire), MARIA MAYERHOFER-KARG, mother of Karl Mayerhofer (killed in Nov.

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08-4090-cv(con)
08-4097-cv(con)
08-4153-cv(con)
08-4160-cv(con)
08-4407-cv(con)
08-5443-cv(con)
08-5460-cv(con)
08-5515-cv(con)
08-5516-cv(con)
08-5518-cv(con)
08-5526-cv(con)
09-2080-cv(con)

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* The Honorable Guido Calabresi recused himself from participation in the decision of this case, which is decided by the remaining members of the panel, who are in agreement. *See* Local Rule § 0.14(b).

11, 2000 Kaprun fire), AGNES WOLF, survivor of Nov. 11, 2000 Kaprun fire,

Plaintiffs-Appellants,

v.

OMNIGLOW CORPORATION, OMNIGLOW L.P., OMNIGLOW MANAGEMENT LLC, SCIENS CAPITAL PARTNERS L.P., GMS ACQUISITION PARTNERS LLC, CYALUME TECHNOLOGIES INC., OMNIGLOW LLC, HYDAC TECHNOLOGY CORP., SIEMENS TRANSPORTATION SYSTEMS, INC., BOSCH REXROTH CORPORATION, OMNIGLOW LIMITED PARTNERS OF NY, WIKA INSTRUMENT CORPORATION, EXXON MOBIL CORPORATION,

Defendants-Appellees.**

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FOR PLAINTIFFS-APPELLANTS:

JAMES F. LOWY, Lowy Law Firm, LLC, Tampa, FL

FOR DEFENDANTS-APPELLEES:

BRANDT W. BISHOP, (Robert B. Gilmore and Lee Rudofsky, *on the brief*), Kirkland & Ellis LLP, Washington, DC, *for Siemens Transportation Systems, Inc.*

** The Clerk of Court is directed to amend the official caption to conform to the listing of the parties stated above.

Nancy Ledy Gurren, Ledy-Gurren Bass & Siff, LLP, New York, NY, *for Hydac Technology Corp*

Eileen McCabe, Mendes & Mount LLP, New York, NY, *for Wika Instrument Corporation*

Arnd N. von Waldow, Reed Smith LLP, Pittsburgh, PA, *for Bosch Rexroth Corporation and Robert Bosch Corporation*

Audrey Cumming (John F. Tulley and Robert Owen, *on the brief*), Fulbright & Jaworski LLP, New York, NY, *for Exxon Mobil Corporation*

E. Gordon Haesloop, Bartlett, McDonough, Bastone & Monaghan, Mineoloa, NY, *for Omniglow Corporation*

Appeal from a judgment of the United States District Court for Southern District of New York (Shira A. Scheindlin, *Judge*).

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED**.

Plaintiffs-appellants ("plaintiffs") appeal from an order of the District Court dated June 19, 2007, dismissing their claims on the basis of the doctrine of *forum non conveniens*. These consolidated appeals concern claims that arise from the tragic ski train fire in Kaprun, Austria, that killed 155 passengers on November 11, 2000. Plaintiffs, none of whom are citizens or residents of the United States, argue that

the District Court erred in the following respects: (1) by according too little deference to plaintiffs' choice of a forum in New York, (2) by concluding that plaintiffs' claims would not be time-barred in Austria, (3) by finding that Austria is an adequate alternative forum despite alleged evidence of bias, (4) by concluding that the balance of public and private factors favors continuing the litigation in Austria, (5) by failing to place certain conditions on its dismissal, and (6) by failing to rule on, or treating as withdrawn, plaintiffs' motions for reconsideration. We assume the parties' familiarity with the remaining factual and procedural history of this case.

We review a dismissal under the doctrine of *forum non conveniens* for abuse of discretion. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 153 (2d Cir. 2005). A district court abuses its discretion in granting a *forum non conveniens* dismissal when its decision "(1) rests either on an error of law or on a clearly erroneous finding of fact, or (2) cannot be located within the range of permissible decisions, or (3) fails to consider all the relevant factors or unreasonably balances those factors." *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 70 (2d Cir. 2003) (citation omitted).

Here, we find no error in the District Court's thorough and careful *forum non conveniens* analysis. *See In re Ski Train Fire in Kaprun Austria on November 11, 2000*, 499 F. Supp. 2d 437 (S.D.N.Y. 2007). The Court properly found that plaintiffs' choice of forum was entitled to "very little deference" based on

(1) the fact that they chose to litigate in a foreign forum and (2) the "strong inference that forum shopping motivated" their decision to sue in the United States. *Id.* at 444-46; *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981) ("When the plaintiff is foreign" the assumption that its chosen U.S. forum is convenient "is much less reasonable."); *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 73 (2d Cir. 2001) (en banc) ("[W]e give . . . diminishing deference to a plaintiff's forum choice to the extent that it was motivated by tactical advantage.").

With respect to their claim that Austria is an inadequate forum, we conclude that plaintiffs have waived any argument that their claims would be barred by applicable statutes of limitations in Austria. Not only did plaintiffs not raise this issue before the District Court, they argued precisely the *opposite* in opposing defendants' motion to dismiss. *See In re Ski Train Fire*, 499 F. Supp. 2d at 443 n.35 (noting that "plaintiffs do not allege that their claims must be brought in the United States because they would be time-barred in Austria"); *see also Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.").[1] Nor are we persuaded that Austria is an

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[1] The fact that plaintiffs raised this argument in their July 31, 2007 motion for reconsideration is of no avail. *See Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, Inc.*, 322 F.3d 147, 159 (2d Cir. 2003) ("Generally, we

(Continued on following page)

inadequate alternative forum by plaintiffs' allegations of corruption and bias. *See PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 73 (2d Cir. 1998) ("[C]onsiderations of comity preclude a court from adversely judging the quality of a foreign justice system absent a showing of *inadequate procedural safeguards*." (emphasis added)); *Blanco v. Banco Indus. de Venez., S.A.*, 997 F.2d 974, 982 (2d Cir. 1993) ("[I]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation." (internal quotation marks omitted)). As the District Court observed, "the fact that *all* foreign plaintiffs presently are pursuing actions in Austrian courts arising out of the ski train fire dramatically undercuts any argument . . . that Austrian courts have 'already prejudged the victim[s] claims.'" *See In re Ski Train Fire*, 499 F. Supp. 2d at 447.[2] We also find no error in the District Court's careful weighing of the public and private convenience factors and its conclusion that those factors weigh in favor of dismissal for *forum non conveniens*. *See id.* at 447 (discussing private

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will not consider an argument on appeal that was raised for the first time below in a motion for reconsideration.").

[2] Even taking into account the voluminous media reports that plaintiffs have attached to their eight motions to augment the record, we are not convinced that Austrian courts are so inherently biased as to render Austria an inadequate forum for plaintiffs' claims. If anything, those reports suggest just how seriously Austria is treating accusations of wrongdoing on the part of experts in the criminal trial arising from this incident.

convenience factors and noting that "[n]o relevant events occurred in the United States, no relevant evidence is located in this country, and most key defendants and key witnesses (including most plaintiffs) are found in Austria or elsewhere in Europe"); *id.* at 451 (discussing public convenience factors and noting that "Austria's interest in all Kaprun-related litigation is far greater than New York's interest" and that "it is a virtual certainty that Austrian law will govern most issues in these cases" (internal quotation marks omitted)).[3]

Plaintiffs assert that the District Court erred by dismissing their claims without requiring defendants to waive any statute of limitations defense in Austria or to consent to jurisdiction in Austria. As discussed above, plaintiffs argued in the District Court that their claims were *not* time-barred in Austria and therefore it was not error for the District Court to dismiss plaintiffs' claims without requiring defendants to waive any statute of limitations defense. Moreover, the District Court did not "abuse its discretion" by

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[3] Since the District Court's decision, a global settlement of all claims related to the Kaprun fire – including plaintiffs' claims at issue here – has purportedly been reached. Defendants assert that this settlement renders the current appeal moot. Plaintiffs respond that the settlement was entered into under duress and was procured by fraud. Regardless of whether the settlement is enforceable against plaintiffs, it appears that any issues relating to it will be governed by *Austrian law*, thus further suggesting that Austria is the appropriate forum to resolve this dispute.

finding that "[Siemens Transportation Systems], along with other defendant corporations, have foreign affiliates that are much more closely linked to the allegedly tortious conduct spelled out in plaintiffs' complaints, and . . . these foreign affiliates would be subject to the jurisdiction of an Austrian court." *See id.* at 447 n.71.[4] Finally, we find no error in the District Court's handling of plaintiffs' various motions brought pursuant to Fed. R. Civ. P. 60(b). The District Court's denial of plaintiffs' June 2008 motion as untimely was more than justified, as the motion concerned an order entered over one year before. *See* Fed. R. Civ. P. 60(c)(1) ("A motion under Rule 60(b) must be made within a reasonable time. . . ."). Nor did the District Court err in refusing to rule on plaintiffs' January 2007 motion for reconsideration – which concerned the prior dismissal of another defendant for lack of personal jurisdiction – before dismissing all of these consolidated appeals on *forum non conveniens* grounds. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007) ("[A] district court has discretion to respond at once to a defendant's *forum non conveniens* plea, and need not take up first any other threshold objection," including subject matter jurisdiction or personal jurisdiction.).

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[4] Notably, in arguing that Austria is not an adequate forum, plaintiffs do not raise the issue of jurisdiction over the defendants. Moreover, they offer only the conclusory statement that "[t]here is great concern that Defendants are not subject to the jurisdiction of Austrian courts," Appellant's Br. 44, to support their argument that conditional dismissal was required.

CONCLUSION

We have considered all of plaintiffs' arguments and find them to be without merit. For the foregoing reasons, the judgment of the District Court is **AFFIRMED**.

FOR THE COURT,
Catherine O'Hagan Wolfe,
Clerk of Court

By _____

499 F.Supp.2d 437

United States District Court,
S.D. New York.
In re SKI TRAIN FIRE IN KAPRUN AUSTRIA
ON NOVEMBER 11, 2000.
This document relates to the following actions:
Johann Blaimauer, et al., Plaintiffs,
v.
Omniglow Corporation, et al., Defendants.
Herman Geier, et al., Plaintiffs,
v.
Omniglow Corporation, et al., Defendants.
Nanae Mitsumoto, et al., Plaintiffs,
v.
The Republic of Austria, et al., Defendants.
Nanae Mitsumoto, et al., Plaintiffs,
v.
Robert Bosch Corporation, et al., Defendants.
Joop H. Stadman, et al., Plaintiffs,
v.
Austrian National Tourist Office Inc., et al.,
Defendants.
MDL No. 1428 (SAS).
Nos. 03-CV-8960 (SAS), 03-CV-8961 (SAS),
06-CV-2811 (SAS), 07-CV-935 (SAS),
07-CV-3881 (SAS).

June 19, 2007.

Edward D. Fagan, Esq., c/o Hantman & Associates, Robert J. Hantman, Esq., Hantman & Associates, New York, NY, James F. Lowy, Esq., International Law Group, LLC, Tampa, FL, for Plaintiffs.

Paul P. Rooney, Esq., Reed Smith LLP, New York, NY, Liaison Counsel for all Defendants.

Ryan M. Morettini, Esq., Kirkland & Ellis LLP, Robert W. Littleton, Esq., Littleton Joyce Ughetta & Park LLP, New York, NY, Brant W. Bishop, Esq., Kirkland & Ellis LLP, Washington, D.C., for Defendant Siemens Transportation Systems, Inc.

Arnd N. von Waldow, Esq., Paul P. Rooney, Esq., Reed Smith LLP, New York, NY, for Defendant Robert Bosch Corp.

Eileen T. McCabe, Esq., Stephen Roberts, Esq., William Lalor, Esq., Mendes & Mount LLP, New York, NY, for Defendant Wika Instrument Corp.

Nancy Ledy-Gurren, Esq., Ledy-Gurren, Bass & Siff LLP, New York, NY, for Defendant Hydac Technology Corp.

E. Gordon Haesloop, Esq., Bartlett McDonough, Bastone & Monaghan LLP, Mineola, NY, for Defendants American Cyanamid Inc. and Omniglow Corp.

John F. Tully, Esq., Robert Owen, Esq., Fulbright & Jaworski LLP, New York, NY, for Defendant Exxon Mobil.

OPINION & ORDER

SCHEINDLIN, District Judge.

These cases arise from a disaster that occurred on November 11, 2000, in which a ski train in

Kaprun, Austria caught fire, killing 155 people. American and foreign survivors and/or relatives of those who died in the fire brought a number of lawsuits in federal court against numerous defendants alleging, *inter alia,* negligence and strict liability. The Judicial Panel on Multidistrict Litigation assigned these actions to this Court for coordinated or consolidated pretrial proceedings. The actions within this multidistrict litigation ("MDL") fall easily into two groups – those filed on behalf of American plaintiffs,[1] and those filed on behalf of foreign plaintiffs. There are five actions falling in the latter category, and defendants now jointly move to dismiss three of them ("*Blaimauer,*" "*Geier*" and "*Mitsumoto v. Robert Bosch*") on several grounds, including forum non conveniens.[2] For the reasons stated below, defendants'

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[1] *See, e.g., Habblett v. Omni-Glow Corp.,* Nos. 01 MDL 1428, 02 Civ. 2492 (filed April 1, 2002) Civ. 2492 (filed April 1, 2002); *Habblett v. Siemens AG,* Nos. 01 MDL 1428, 01 Civ. 6554 (filed July 19, 2001). Hereafter, I refer to the cases brought on behalf of American plaintiffs as the "*Habblett* cases."

[2] The parties have engaged in extensive motion practice. To avoid repetitive briefing, only one defendant, Siemens Transportations Systems, Inc., briefed the motion to dismiss *Blaimauer* and *Geier* on the ground of forum non conveniens, which the remaining *Blaimauer* and *Geier* defendants incorporated by reference into their individually-filed motions to dismiss. Similarly, the defendants in *Mitsumoto v. Robert Bosch* jointly move for dismissal on the ground of forum non conveniens, as briefed by Exxon Mobil. *See* Memorandum of Law in Support of Exxon Mobil Corporation's Motion to Dismiss ("Exxon Mem.") at 13-22. Motions to dismiss have not yet been filed in *Mitsumoto v. The Republic of Austria* (all briefing of dispositive motions was stayed pending service of plaintiffs' amended complaint on

(Continued on following page)

motion is granted, and all five of the foreign plaintiffs' actions are dismissed.[3]

I. BACKGROUND[4]

Both *Blaimauer* and *Geier* were filed originally on November 10, 2003, and since have been amended numerous times. According to the most recently amended complaints, the *Blaimauer* plaintiffs all hail from Germany, Austria, Japan and Slovenia;[5] the *Geier* plaintiffs are all "citizens and/or residents of Germany."[6] The defendants in both actions are identical and include the following parties: Cyalume Technologies Inc., Omniglow Limited Partners of New

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sovereign defendants), or in *Stadman v. Austrian Nat'l Tourist Office Inc.* (filed May 17, 2007).

[3] Because I dismiss these actions based on forum non conveniens, I do not reach defendants' alternative arguments for dismissal, such as those predicated on statutes of limitations.

[4] For a more thorough discussion of the procedural history of this MDL, see *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000,* Nos. 01 MDL 1428, 01 Civ. 6554, 01 Civ. 7242, 04 Civ. 1402, 2005 WL 1523508, at *1-2 (S.D.N.Y. June 27, 2005) ("*Ski Train I*"); *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000,* 230 F.Supp.2d 403, 404 (S.D.N.Y.2002) ("*Ski Train II*"). There have been many more rulings in this MDL than I cite herein; it is only for ease of reference that throughout this Opinion, I assign these decisions consecutive roman numerals in the order in which I refer to them.

[5] *See Blaimauer* Fourth Amended Complaint ("*Blaimauer* 4th Amend. Compl.") ¶ 3.

[6] *Geier* Fourth Amended Complaint ("*Geier* 4th Amend. Compl.") ¶ 3.

York ("Omniglow"), Siemens Transportation Systems Inc. ("STS"), Bosch Rexroth Corporation ("Bosch"), Hydac Technology Corporation ("Hydac") and Wika Instrument Corporation ("Wika").

Because all defendants named in *Blaimauer* and *Geier* are American corporations, this Court presumably has federal diversity jurisdiction pursuant to section 1332 of title 28 of the United States Code.[7] Although several defendants' individually-filed motions to dismiss raise colorable jurisdictional questions, I do not reach them here, as this Court "has discretion to respond at once to a defendant's *forum non conveniens* plea, and need not take up first any other threshold objection."[8]

II. APPLICABLE LAW

A. Collateral Estoppel

"Under the doctrine of offensive collateral estoppel, a plaintiff may preclude a defendant from relitigating an issue the defendant has previously

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[7] *See* 28 U.S.C. § 1332.

[8] *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, ___, 127 S.Ct. 1184, 1188, 167 L.Ed.2d 15 (2007) (holding that "a court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event," the case may be properly dismissed under the doctrine of forum non conveniens).

litigated and lost to another plaintiff."[9] In order to bar a defendant from raising a legal issue on collateral estoppel grounds, a plaintiff must show that (1) the issues in both proceedings are *identical*; (2) the issue in the prior proceeding was actually litigated and decided; (3) the defendant had a "'full and fair opportunity'" to litigate the issue in the prior proceeding; and (4) "'the issue previously litigated . . . [was] necessary to support a valid and final judgment on the merits.'"[10]

B. Forum Non Conveniens

"Forum non conveniens is a discretionary device permitting a court in rare instances to dismiss a claim even if the court is a permissible venue with proper jurisdiction over the claim."[11] The doctrine authorizes courts to dismiss cases where "an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience."[12] Courts may

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[9] *Faulkner v. National Geographic Enters. Inc.*, 409 F.3d 26, 37 (2d Cir.2005) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979)).

[10] *Id.* (quoting *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir.1986)).

[11] *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir.2000) (quotations and citation omitted).

[12] *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981) (quotations and citation omitted).

decline to exercise jurisdiction under this doctrine when it is determined that, weighing "relative advantages and obstacles to fair trial" in the alternative fora, and the practical considerations of which forum will "make trial of a case [more] easy, expeditious and inexpensive," "the balance is strongly in favor" of the defendant's request for dismissal in favor of a more convenient forum.[13]

In deciding whether to dismiss for forum non conveniens, courts in this Circuit undertake a three-step analysis. *First,* courts determine the degree of deference due the plaintiff's choice of forum.[14] *Second,* courts examine whether there is an adequate alternative forum for the dispute.[15] *Third,* courts engage in a balanced assessment of the competing private interests of the parties in the choice of forum, and the public interests of the alternative fora under consideration.[16] Throughout this analysis, the defendant bears the burden of showing that each step "tilt [s] strongly in favor of trial in the foreign forum."[17] "The action should be dismissed only if the chosen

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[13] *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).

[14] *See Iragorri v. United Techs. Corp.,* 274 F.3d 65, 73 (2d Cir.2001) (*en banc*).

[15] *See id.*

[16] *See id.* at 73-74.

[17] *Wiwa,* 226 F.3d at 108. *Accord P.T. United Can Co. v. Crown Cork & Seal Co.,* 138 F.3d 65, 74 (2d Cir.1998).

forum is shown to be genuinely inconvenient and the selected forum significantly preferable."[18]

1. The Degree of Deference Accorded a Plaintiff's Choice of Forum

"Any review of a forum non conveniens motion starts with 'a strong presumption in favor of the plaintiff's choice of forum.'"[19] However, the strength of this presumption, and the degree of deference due the plaintiff's selection, "varies with the circumstances."[20] The degree of deference to be accorded the plaintiff's choice of forum is not determinative of the final outcome; rather, it merely re-calibrates the scales for the remaining two steps of the analysis.[21] "[T]he greater the degree of deference to which the plaintiff's choice of forum is entitled, the stronger a showing of inconvenience the defendant must make to prevail in securing *forum non conveniens* dismissal."[22] Conversely, where less deference is due, "the easier it becomes for the defendant to succeed on a forum non conveniens motion by showing that

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[18] *Iragorri*, 274 F.3d at 74-75.

[19] *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 154 (2d Cir.2005) (quoting *Piper Aircraft*, 454 U.S. at 255, 102 S.Ct. 252).

[20] *Iragorri*, 274 F.3d at 71.

[21] *See id.* at 73-74.

[22] *Id.* at 74.

convenience would be better served by litigating in another country's courts."[23]

A "plaintiff's choice of forum is generally entitled to great deference when the plaintiff has sued in the plaintiff's home forum."[24] "The reason great deference is generally afforded a plaintiff's choice of its home forum 'is because it is presumed to be convenient.'"[25] By contrast, the choice of a United States forum by a foreign plaintiff is entitled to less deference, for the presumption that the choice is convenient "is much less reasonable."[26]

Courts must also consider whether the plaintiff's choice of forum appears to be "motivated by desire to impose tactical disadvantage on the defendant."[27] Additionally, where indicia of forum shopping are present, the presumption in favor of the plaintiff's choice of forum "may not apply, either at all or with full force."[28] Indicia of forum shopping may include: "attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case . . . [and] the

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[23] *Id.* at 72.

[24] *Piper Aircraft,* 454 U.S. at 255, 102 S.Ct. 252.

[25] *Norex Petroleum,* 416 F.3d at 154 (quoting *Iragorri,* 274 F.3d at 71).

[26] *Piper Aircraft,* 454 U.S. at 256, 102 S.Ct. 252.

[27] *Iragorri,* 274 F.3d at 73.

[28] *Norex Petroleum,* 416 F.3d at 154.

inconvenience and expense to the defendant resulting from litigation in that forum."[29]

2. Adequacy of the Alternate Forum

After determining the appropriate degree of deference to accord plaintiff's choice, "the court must consider whether an adequate alternative forum exists."[30] The movant bears the burden to demonstrate the adequacy of the alternate forum.[31] "Ordinarily, this requirement will be satisfied when the defendant is amenable to process in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied."[32] The mere fact that the substantive law in the alternative forum is less favorable to the plaintiffs is not sufficient to show that the alternative forum is inadequate.[33] However, proposed alternative fora have been ruled inadequate "where the alternative forum does not permit litigation of the subject matter of the dispute,"[34] and where "a statute of

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[29] *Iragorri,* 274 F.3d at 72. *Accord Norex Petroleum,* 416 F.3d at 155.

[30] *Iragorri,* 274 F.3d at 73.

[31] *See Norex Petroleum,* 416 F.3d at 157.

[32] *Piper Aircraft,* 454 U.S. at 255 n. 22, 102 S.Ct. 252.

[33] *See id.* at 247, 102 S.Ct. 252.

[34] *Id.*

limitations bars the bringing of a case in a foreign forum that would be timely in the United States."[35]

However, it is the plaintiff that carries the burden of proof when contesting the adequacy of the alternate forum on the basis that the court system is corrupt or inefficient, because "considerations of comity preclude a court from adversely judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards."[36] Courts are reluctant "'to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation.'"[37] Consequently, "[t]he 'alternative forum is too corrupt to be adequate' argument does not enjoy a particularly impressive track record."[38] Along those lines, in *Tuazon v. R.J. Reynolds Tobacco Co.*, the Ninth Circuit held that the trial court erred in concluding that the Philippines was an inadequate forum, where that conclusion relied on plaintiff's "general allegations" of corruption and delay in the Philippine court system.[39] In other words, in order for

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[35] *Norex Petroleum*, 416 F.3d at 159. With respect to the cases at bar, plaintiffs do not allege that their claims must be brought in the United States because they would be time-barred in Austria.

[36] *P.T. United Can*, 138 F.3d at 73.

[37] *Id.* (quoting *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 982 (2d Cir.1993)).

[38] *Eastman Kodak Co. v. Kavlin*, 978 F.Supp. 1078, 1084 (S.D.Fla.1997) (collecting cases).

[39] 433 F.3d 1163, 1178-80 (9th Cir.2006) (affirming dismissal on other grounds).

a plaintiff to establish successfully the inadequacy of an alternative forum, she must "plainly demonstrate that [she is] highly unlikely to obtain basic justice [in the foreign jurisdiction]."[40]

3. Balancing Public and Private Factors

With respect to the third stage of a forum non conveniens analysis, the first set of factors courts must consider are the relative conveniences to the parties of litigating in plaintiff's chosen forum or in the alternative forum proposed by defendant.[41] These factors encompass: "'the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling [witnesses], and the cost of obtaining attendance of willing[ ] witnesses . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive.'"[42] In undertaking this analysis, courts should examine the specifics of the claims: "[r]ather than simply characterizing the case as one in negligence, contract, or some other area of law, the court should focus on the precise issues that are likely to be actually tried."[43] However, courts need not undertake to identify all "the rights,

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[40] *Leon v. Million Air, Inc.*, 251 F.3d 1305, 1312 (11th Cir.2001).

[41] *See Iragorri*, 274 F.3d at 73.

[42] *Id.* at 73-74 (quoting *Gulf Oil*, 330 U.S. at 508, 67 S.Ct. 839).

[43] *Id.* at 74.

remedies, and procedures available under the law that would be applied in each forum."[44]

The second set of factors courts must balance are those of public convenience. "Public interest factors include: court congestion; the interest of forums in having local disputes decided at home; and, the interest in having issues of law decided by courts of the nation whose law is involved."[45]

III. DISCUSSION

A. Collateral Estoppel

As a threshold consideration, plaintiffs argue that the doctrine of collateral estoppel precludes defendants moving for forum non conveniens dismissal.[46] Plaintiffs present this as their strongest defense against defendants' joint motion, but it may be disposed of swiftly. The prior proceeding underpinning plaintiffs' collateral estoppel claim is a previous decision by this Court denying a motion to dismiss the American plaintiffs' *Habblett* cases for forum non conveniens.[47] Foreign plaintiffs contend

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[44] *Piper Aircraft*, 454 U.S. at 252, 102 S.Ct. 252.

[45] *Carey v. Bayerische Hypo-Und Vereinsbank, A.G.*, 370 F.3d 234, 237 (2d Cir.2004).

[46] *See* Plaintiffs' Response to [Second] Motion to Dismiss Based on Alleged *Forum Non Conveniens* and Statute of Limitations Grounds ("Pl.Mem.") at 6-8.

[47] *See In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, 230 F.Supp.2d 376 (S.D.N.Y.2002) ("*Ski Train III*").

that collateral estoppel applies because "nothing has changed" since that ruling, in which the Court addressed issues "virtually identical" to those raised by defendants' present motion.[48] This analogy is just as disingenuous as it is unavailing, for it glosses over a stark and critical distinction that has been reiterated time and again, which is that the *Habblett* plaintiffs are *all American citizens.* By any reading of *Ski Train III*, the fact that the *Habblett* plaintiffs are American citizens (two of whom then resided in the Southern District of New York) was a decisive factor in the Court's forum non conveniens analysis.[49] Because the issues currently before the Court are not identical to those previously litigated, plaintiffs' invocation of the collateral estoppel doctrine must fail.

B. Forum Non Conveniens

1. Deference to Plaintiffs' Choice of Forum

From the outset, because none of these plaintiffs is an American citizen, plaintiffs' choice of the United States as a forum commands "considerably less" deference than it would if this country were their home.[50] Additionally, defendants urge this Court to accord plaintiffs' forum choice *zero* deference on the

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[48] Pl. Mem. at 9.

[49] *See Ski Train III*, 230 F.Supp.2d at 388.

[50] *Gilstrap v. Radianz, Ltd.*, 443 F.Supp.2d 474, 479 (S.D.N.Y.2006).

grounds that it was based on impermissible forum shopping.[51] As the Second Circuit has recognized, where a foreign plaintiff has chosen a United States forum, "a plausible likelihood exists that the selection was made for forum shopping reasons, such as the perception that United States courts award higher damages than are common in other countries."[52] This likelihood rises dramatically in situations where neither the plaintiffs nor the event giving rise to the lawsuit have any "bona fide connection[s]" to the United States.[53] While defendants proffer no hard evidence that plaintiffs' decision was aimed at obtaining an impermissible tactical advantage, procedural considerations such as fee awards raise a strong inference that forum shopping motivated foreign plaintiffs' decision to sue in the United States.[54]

To start, defendants observe that nowhere in plaintiffs' opposition do they articulate a single legitimate, substantiated justification for electing to

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[51] *See* Reply Memorandum of Law in Support of Siemens Transportation Systems, Inc.'s Motion to Dismiss ("STS Reply Mem.") at 7.

[52] *Iragorri*, 274 F.3d at 72.

[53] *Id.*

[54] *See Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 73 (2d Cir.2003) (in assessing the degree of deference to accord a plaintiff's choice of forum, courts should look to the plaintiff's "likely motivations in light of all the relevant indications").

pursue their claims in the United States.[55] Defendants further suggest that the following factors are suggestive of forum shopping: plaintiffs are more likely to get higher damages awards and contingency fees for attorneys in the United States; plaintiffs are not suing to enforce federal laws;[56] these are diversity actions arising in Austria and governed by Austrian law;[57] all plaintiffs hail from Europe and Asia, thus rendering the United States a comparatively inconvenient forum; and in at least one instance, plaintiffs brought suit against the American affiliate of a real party in interest merely "in a transparent attempt to secure diversity jurisdiction in federal court."[58] Taken together, these considerations – particularly the last one, which plaintiffs neglect to oppose and which is more fully discussed below – are probative of forum shopping.[59]

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[55] *See* STS Reply Mem at 9. The only legitimate reason for choosing a U.S. forum suggested in plaintiffs' brief is that "[w]histleblower witnesses have come forward with critical evidence that can only be presented in the United States and others [sic]." Pl. Mem. at 4. But these "whistleblower witnesses" did not come forward until sometime in 2006, years after plaintiffs first filed these actions in federal court.

[56] *Cf. DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 28 (2d Cir.2002) (reasonable to presume that foreign plaintiffs invoking United States securities laws would choose United States forum for convenience).

[57] *Cf. Gilstrap*, 443 F.Supp.2d at 479.

[58] STS Reply Mem. at 8.

[59] *See Strategic Value Master Fund, Ltd. v. Cargill Fin. Servs. Corp.*, 421 F.Supp.2d 741, 762 (S.D.N.Y.2006) (according

(Continued on following page)

As foreigners, plaintiffs properly can invoke this Court's diversity jurisdiction by bringing suit against American business entities, *i.e.*, STS, a Delaware corporation; Hydac, a Pennsylvania corporation; and Wika, a New York corporation. Plaintiffs, however, cannot bring suit in this Court where another foreign entity is named as the primary defendant, for such party would destroy diversity.[60] For example, it is no mystery that plaintiffs do not name Siemens Austria as a defendant even though it is the only Siemens entity that built systems for the Kaprun train.[61] Nor do plaintiffs name Siemens AG as a defendant, a German corporation with its principal place of business in Munich, although Siemens AG supplied Siemens Austria with parts that may have been incorporated on the train systems (and thus Siemens AG has long since been a defendant in the *Habblett*

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less deference to foreign plaintiffs' choice of forum where plaintiffs decided not to sue the real party in interest (an English company with its principal place of business in England), but rather its affiliate (a Delaware corporation), in order to preserve diversity jurisdiction).

[60] *See* 28 U.S.C. § 1332(a)(2).

[61] *See* Memorandum of Law in Support of Siemens Transportation Systems, Inc.'s Motion to Dismiss ("STS Mem.") at 7-8. Prior to foreign plaintiffs' filing of these actions, the American plaintiffs had identified Siemens AG, Siemens Corporation and Siemens Austria as parties in interest and named them as defendants in the *Habblett* cases. In 2002, this Court granted Siemens Austria's motion to dismiss for lack of personal jurisdiction and denied Siemens AG's motion to dismiss on the same grounds. *See Ski Train III*, 230 F.Supp.2d at 376.

cases).[62] Facts borne out in the early stages of these suits indicate that plaintiffs were aware at the time they filed their initial complaints that the allegations contained therein implicate Siemens Austria and Siemens AG more than any other Siemens entity.[63] Tellingly, plaintiffs target the allegations in their amended complaints at the *foreign affiliates* of STS, to wit the "SIEMENS-Transportation . . . entities located in Germany or Austria."[64] In order to overcome the jurisdictional hurdles of pursuing their claims in this forum, plaintiffs were forced to sue STS, whose only alleged connection to the Kaprun disaster is the wrongdoing of its foreign affiliates.[65]

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[62] *See* STS Mem. at 8.

[63] *See id.*

[64] *Blaimauer* 4th Amend. Compl. ¶ 73; *Geier* 4th Amend. Compl. ¶ 73.

[65] Compared to its foreign affiliates, STS is only remotely connected to the wrongdoing alleged in plaintiffs' complaints. *See* STS Mem. at 2 (noting that STS has never been named as a defendant in the *Habblett* cases). Prior to amending their complaints for a fourth time, plaintiffs had named Siemens AG and Siemens Austria as defendants "doing business as" Siemens Corporation, STS, and a host of other U.S.-based Siemens companies. In their Fourth Amended Complaints, plaintiffs ultimately dropped all Siemens entities save for STS as defendants. *See Blaimauer* 4th Amend. Compl. ¶¶ 68; 73; *Geier* 4th Amend. Compl. ¶¶ 67, 72. Additionally, because foreign plaintiffs' claims against Siemens Corporation were recently dismissed with prejudice from a parallel New York state action, their federal court claims against Siemens Corporation would likely be barred as a result of *res judicata*. *See* Order, *Mitsumoto v. Bosch Rexroth AG*, No. 06/105008 (Sup.Ct.N.Y.Co. Dec. 8, 2006).

That there are powerful indicators that plaintiffs are suing STS solely to preserve diversity – in effect using STS as a conduit for asserting claims against real parties in interest who are foreign – leads this Court to accord very little deference to plaintiffs' choice of forum.[66]

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[66] *See Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC*, 155 F.3d 603, 612 (2d Cir.1998) ("Because the real parties in interest are foreign corporations, there is not a strong presumption in favor of the plaintiffs' choice of forum."). *See also Pollux Holding Ltd.*, 329 F.3d at 74 ("[A] plaintiff's choice to initiate suit in the defendant's home forum . . . only merits heightened deference to the extent that the plaintiff and the case possess *bona fide* connections to, and convenience factors favor, that forum."). That plaintiffs are using American corporations as a pretext for asserting claims against their foreign affiliates who are the real parties in interest is most obvious as to STS, although Wika argues a similar point in its separately filed motion to dismiss. To wit, Wika argues – unopposed – that even accepting plaintiffs' allegations as true, by the complaints' plain language, the real parties in interest are clearly Wika's foreign affiliates, rather than Wika itself. *See* Wika Amended Memorandum of Law in Further Support of Wika Instrument Corporation's Motion to Dismiss at 2-5 (citing, *inter alia*, *Blaimauer* 4th Amend. Compl. ¶¶ 114-116, stating that "Wika is the subsidiary, alter ego, actual and/or de facto agent for their German foreign parents Defendant WIKA" and that "Defendant WIKA works together with and provides technology, materials, equipment and services, to other Defendants . . . which were involved with The Train, Tunnel, Alpine Center & Valley Station").

C. Austria as an Adequate Forum

Defendants have met their burden of demonstrating the adequacy of an alternative forum. Defendants offer unrebutted evidence that Austria has an effective and efficient judicial system,[67] bolstering this Court's own previous finding that Austria provides an adequate alternative forum for litigating disputes arising out of the Kaprun disaster.[68] Additionally, the fact that *all* foreign plaintiffs presently are pursuing actions in Austrian courts arising out of the ski train fire dramatically undercuts any argument that Austria is an inadequate forum.[69] Specifically, it belies plaintiffs' conclusory and wholly

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[67] *See* Expert Report of Austrian Superior Court Judge Georg E. Kodek ("Kodek Report"), Exhibit ("Ex.") B to Declaration of Ryan M. Morettini, counsel for STS ("Morettini Decl.") ¶¶ 1.2, 1.3, 1.4.

[68] *See Ski Train III,* 230 F.Supp.2d at 387-88 (noting that although plaintiffs raised "serious questions going to the integrity of the criminal investigation in Austria," it is the integrity of Austria's judicial system – "not that of the executive branch" – that is important to the forum non conveniens inquiry).

[69] Indeed, plaintiffs' counsel has informed the Court that each foreign plaintiff (either individually or as a family) currently has an action pending in an Austrian court against at least one defendant, arising out of the Kaprun disaster. *See* 6/18/07 Email from Edward D. Fagan, counsel for foreign plaintiffs, to the Court. *See also* STS Mem. Appendix 2 (listing the thirty-four *Blaimauer* plaintiffs and seven *Geier* plaintiffs with actions pending in Austria, as well as the corresponding Austrian case numbers and the names of plaintiffs' local counsel).

unsubstantiated claim that Austrian courts have "already pre-judged the victim [sic] claims."[70] Nor do plaintiffs offer any bases for their assertion that Austria is an inadequate alternative forum because the "majority of the defendants" are "not subject to the jurisdiction of [Austrian] courts."[71] The second requirement for forum non conveniens dismissal is satisfied.

D. Balancing of Public and Private Interests

1. Private Convenience Factors

Defendants show that private interest factors weigh in favor of dismissal. No relevant events occurred in the United States, no relevant evidence is located in this county, and most key defendants and key witnesses (including most plaintiffs) are found in Austria or elsewhere in Europe. Plaintiffs argue that "everything that has occurred in this case in the last five years strengths [sic] the Courts [sic] keeping the plaintiffs [sic] claims in the United States," but the

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[70] Pl. Mem. at 4.

[71] *Id.* Plaintiffs do not dispute defendants' observation that STS, along with other defendant corporations, have foreign affiliates that are much more closely linked to the allegedly tortious conduct spelled out in plaintiffs' complaints, and that these foreign affiliates would be subject to the jurisdiction of an Austrian court. *See* STS Reply Mem. at 7-9; *Blaimauer* 4th Amend. Compl. ¶ 73 (alleging wrongdoing on the part of "SIEMENS-Transportation" entities "located in Germany and Austria"); *Geier* 4th Amend. Compl. ¶ 72 (same).

record in these cases demonstrates precisely the opposite.[72] Plaintiffs cannot refute defendants' observation that only "desultory progress" has been made in these cases since they were filed in 2003, and what little progress has been made relates largely to the jurisdictional hurdles plaintiffs face in prosecuting their actions in this forum.[73] For example, since December 2006, much of the parties' time and efforts have been spent addressing plaintiffs' attempts to marshal evidence in support of their motion for this Court to reconsider, pursuant to Federal Rule of Evidence 60(b), its previous ruling dismissing defendant Gletscherbahnen Kaprun Aktiengesellschaft ("GBK") from this MDL for lack of personal jurisdiction.[74] And nearly all of the discovery that plaintiffs

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[72] Pl. Mem. at 9.

[73] STS Mem. at 11.

[74] *See In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, No. 01 MDL 1428, 2003 WL 22909153, at *6 (S.D.N.Y. Dec.9, 2003) ("*Ski Train IV*"); Foreign Plaintiffs' Motion for Rule 60 and Other Relief as Against GBK, relating to 03 Civ. 8960, 03 Civ. 8961, 06 Civ. 2811 (dated "January 11 & 16, 2007"). GBK is a privately held corporation that has its principal place of business in Kaprun, Austria; GBK owns and operates a ski resort located on Kitzsteinhorn Mountain, including the ski train and tunnel involved in the accident. *See Ski Train IV*, 2003 WL 22909153, at *1. In April of this year, days of depositions took place in Austria of the purported "whistleblowers" that plaintiffs claimed would support their motion to have GBK brought back in as a party to this MDL. These depositions were attended by nearly all counsel involved in foreign plaintiffs' actions, in light of plaintiffs' representations that one of the whistleblowers would testify as to first-hand technical knowledge of the train operations and the dangerous products that

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list as having been accomplished in these actions relate solely to preliminary considerations such as jurisdiction and standing, which remain unresolved.[75] With respect to these plaintiffs' actions that name sovereign entities as defendants, no progress has been made at all, for several of these entities are contesting service and/or moving to quash plaintiffs' subpoenas and deposition notices on the grounds that this Court *already* ruled – in previous actions filed by the same counsel who represent foreign plaintiffs here – that personal and/or subject matter jurisdiction was lacking.[76] Defendants also point out that to

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were allowed to be put on the train. *See* 12/18/06 Conference Transcript (12/18/06 "Conf. Tr.") at 41-42. Ultimately, this proved untrue. *See* 4/12/07 Translated Deposition Transcript of Georg Schwarz ("Schwarz Tr.") at 44-45, Ex. 2 to Declaration of Paul P. Rooney, counsel for Bosch Rexroth Corporation, in Support of Defendant Bosch Rexroth Corporation's Motion to Sanction Plaintiffs' Counsel Pursuant to 28 U.S.C. § 1927 and to Disqualify Plaintiffs' Counsel (filed 5/17/07) ("Rooney Decl.").

[75] *See* Pl. Mem. at 3-5. Defendants note that plaintiffs' opposition sets forth numerous factual allegations in "a series of unelaborated and unsupported bulletpoints" that lack any citation to the record. STS Reply Mem. at 11.

[76] *See* Memorandum of Law of Oesterreichische Electrizitaetswirtschafts AG and Verbund-Austrian Hydro Power AG in Further Support of their Motion to Quash the Subpoena Duces Tecum and Deposition Notice (filed 2/7/07 in *Mitsumoto v. Republic of Austria,* 06 Civ. 2811) ("OE-AG Mem.") at 2-4; *Kern v. Oesterreichische Elektrizitaetswirtschaft Ag* ("OE-AG"), 178 F.Supp.2d 367 (S.D.N.Y.2001) (dismissing complaint against OE-AG for lack of subject matter jurisdiction); *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000,* Nos. 01 MDL 1428, 01 Civ. 7342, 2003 WL 1807148, at *6 (S.D.N.Y.Apr.4,2003) (dismissing complaint against Verbund-Austrian Hydro Power AG

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date, there has been no discovery of the individual foreign plaintiffs in the *Blaimauer* case – not a single plaintiff has been deposed.[77] For the purposes of defendants' present motion, the key point is that vast amounts of time and energy have been expended simply in attempts to overcome severe jurisdictional obstacles, without any significant progress being made toward a resolution of these cases.

Nor do plaintiffs refute defendants' contentions that the difficulties the American plaintiffs' have had in pursuing their Kaprun-related litigation here in the United States reinforces the conclusion that Austria would be a far more convenient forum.[78] Effectively all documentary evidence in the American plaintiffs' actions has come from Europe, and the same will be true of these actions.[79] Moreover, the

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for lack of personal jurisdiction); 12/18/06 Conf. Tr. at 11-14 (plaintiffs' counsel acknowledging that Austrian sovereign entities had yet to be properly served).

[77] *See* STS Reply Mem. at 11.

[78] *See* STS Mem. at 25.

[79] Because Austria is not a party to the Hague Convention, plaintiffs' efforts to obtain evidence from Austria through letters rogatory in these cases has proven time consuming and largely unproductive. *See* 5/7/06 Letter from B. Ha, former counsel for plaintiffs, to the Court (requesting seventeen letters rogatory seeking testimony from Austrian witnesses), Ex. G to Morettini Decl.; OE-AG Mem. at 1-2 (stating that as of February 7, 2007, plaintiffs had yet to process the Letters Rogatory authorized by this Court on June 26, 2006); 12/18/06 Conf. Tr. at 10-13 (plaintiffs' counsel explaining difficulties encountered in serving letters rogatory).

logistical difficulties of obtaining all relevant evidence and having it translated into a useable form for this Court are particularly burdensome in light of the record that exists from the criminal trial relating to the ski train fire that took place in Salzburg, Austria, in 2002.[80] Sixteen people were tried, including two state officials; the trial involved sixty days of hearings, testimony from ninety-five witnesses,[81] numerous expert reports and testimony from court-appointed experts.[82] On February 19, 2004, the trial court rendered its verdict acquitting the individual defendants, and also issued a 372-page opinion examining, in detail, the fire, its causes, and the responsibilities of various entities and individuals.[83] It would indeed be "incomprehensibly cumbersome, incredibly

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[80] *See* Exxon Mem. at 17 (citing Expert Report and Declaration of Dr. Georg E. Kodek ("Kodek 2007 Decl."), Ex. A to the Declaration of John F. Tully, counsel for ExxonMobil, in Support of ExxonMobil Corporation's Motion to Dismiss, at §§ 1.5, 4).

[81] According to defendants, many of these witnesses were questioned by the Austrian attorneys who represent plaintiffs in their respective individual actions currently pending in Austria. *See* STS Mem. at 14.

[82] *See* Kodek 2007 Dec. §§ 1.5, 4.

[83] The prosecutor appealed this verdict, but the Court of Appeals in Linz, Austria, affirmed the trial court's judgment on September 27, 2005. *See* STS Mem. at 14 (citing Kodek 2007 Decl. § 1.5). *See also* Kodek 2007 Decl. § 4 (opining that Austrian courts took "unprecedented efforts . . . to find out the true cause of this catastrophe" and that the trial court's judgment offers a "meticulous" and carefully reasoned analysis of the evidence adduced at the criminal trial, which included fifty thousand pages of documents).

costly and time-consuming" to attempt to obtain and translate all of this testimony and tangible evidence.[84]

Most of the witnesses necessary to prosecute the foreign plaintiffs' cases also hail from Europe (even apart from the plaintiffs themselves). Plaintiffs claim, without basis, that "[w]histleblower witnesses have come forward with critical evidence that can only be presented in the United States and others [sic],"[85] but this is patently false, as the Court is aware that both "whistleblowers," Georg Schwarz and Maria Steiner, testified at the Austrian criminal trial, and that neither conveyed information during their recent depositions that could be construed as critical.[86] And plaintiffs' further assurance that "all witnesses who plaintiffs intend to call as witnesses will voluntarily appear" hardly tips the scales at all, for defendants have implied that the third-party witnesses who *defendants* would require to defend these suits currently reside in Europe and may not be amenable to appearing in a United States courtroom.[87] This Court cannot compel the testimony of non-party witnesses living in Austria.

Plaintiffs bootstrap their argument that private convenience factors tip against dismissal on this

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[84] Exxon Mem. at 16.

[85] Pl. Mem. at 4.

[86] *See* Schwarz Tr.; 4/12/07 Translated Deposition Transcript of Maria Steiner, Ex. 7 to Rooney Decl.

[87] STS Reply Mem. at 12.

Court's previous decision in *Ski Train III*. As noted above, plaintiffs' reliance on that opinion is misplaced, for it addressed forum non conveniens issues with respect to the *Habblett* cases. As a threshold comparison, because the plaintiffs in those actions are American, the Court properly accorded their forum choice much greater deference than it accords here.[88] Moreover, in *Ski Train III*, the Court expressly stated that the convenience of the named plaintiffs was a "most important" factor to its forum non convenience analysis.[89] Had the named plaintiffs not been American, the Court's balancing of private conveniences would have been very different. Here, the fact that *all* plaintiffs are non-U.S. residents "severely limits any interest they may have in pursuing their claims in this forum."[90]

Another private interest that weighs heavily in favor of dismissal here – which was not present in the *Habblett* cases – is the fact that defendants will be unable to implead certain foreign parties as third-party defendants because doing so would defeat diversity.[91] For instance, in light of the Austrian trial

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[88] *See Ski Train III*, 230 F.Supp.2d at 387-88.

[89] *Id.* at 388 n. 6.

[90] *Matli v. Strategic Minerals Corp.*, No. 04 Civ. 5555, 2004 WL 2297373, at *1 (S.D.N.Y. Oct. 12, 2004).

[91] This private convenience factor weighs particularly heavily in favor of dismissal where the action is brought by foreign plaintiffs. *See Piper Aircraft*, 454 U.S. at 259, 102 S.Ct. 252 ("The District Court correctly concluded that the problems posed by the inability to implead potential third-party defendants clearly

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court's findings suggesting that GBK, "if anyone," shoulders a large portion of responsibility for the Kaprun accident, the fact that defendants are foreclosed from impleading third-parties such as GBK strongly militates in favor of forum non conveniens dismissal.[92]

Lastly, plaintiffs fail to address the fact that Austria does not recognize foreign judgments, and thus no decision rendered in this litigation would be

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supported holding the trial in Scotland."); *Gulf Oil Corp.*, 330 U.S. at 511, 67 S.Ct. 839 ("Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to the court, jury or most litigants."); *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 453 (2d Cir.1975) ("The inability to implead other parties directly involved in the controversy is a factor which weighs against the retention of jurisdiction in the Southern District of New York."). *See also Strategic Value Master Fund*, 421 F.Supp.2d at 770 (defendant's inability to implead foreign third parties favored dismissal); *Kilvert v. Tambrands Inc.*, 906 F.Supp. 790, 796 (S.D.N.Y.1995) ("A defendant's inability to implead other direct tortfeasors has been held to constitute 'clear prejudice' and thus to point strongly in favor of dismissal. . . . [W]hen an action involves foreign plaintiffs . . . the argument for dismissal is even stronger." (citation omitted)).

[92] Plaintiffs' efforts to add GBK as a party to *Blaimauer* and *Geier* persist notwithstanding the fact that if they are successful, they will have destroyed the very diversity on which this Court's jurisdiction relies. *See In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, 198 F.Supp.2d 420, 426-27 (S.D.N.Y.2002) (holding that GBK is not an "agent or instrumentality" of Austria and thus does not qualify as a sovereign entity for purposes of ascertaining jurisdiction), *aff'd*, 67 Fed.Appx. 24 (2d Cir.2003) (unpublished decision).

accorded *res judicata* effect in Austria.[93] The Court's concern that defendants could not achieve complete finality if they are ultimately absolved of liability in this forum is heightened by the fact that many plaintiffs have commenced their own suits in Austria. As defendants note, a "defense judgment in these actions would have no effect on whether a company such as GBK who is a defendant in the Austrian suits could seek contribution or indemnity from STS or the other co-defendants."[94] The inability to enforce whatever judgment results in this forum supports forum non conveniens dismissal.[95]

2. Public Convenience Factors

The balance of public interests also weighs heavily in favor of dismissal. *First*, there is no dispute that the Kaprun tragedy was the most deadly national tragedy in Austria since World War II. Accordingly, Austria undoubtedly has a significant "'local interest in having [this] localized controvers[y] decided at home.'"[96] As this Court has noted previously,

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[93] *See Kern v. Siemens Corp.*, 393 F.3d 120, 129 n. 8 (2d Cir.2004) ("questions as to the enforceability of a judgment if one is obtained" weigh in favor of dismissal on forum non conveniens grounds).

[94] STS Reply Mem. at 14.

[95] *See Gulf Oil*, 330 U.S. at 508, 67 S.Ct. 839 (recognizing the enforceability of a final judgment, if obtained, as a proper forum non conveniens inquiry).

[96] *Piper Aircraft*, 454 U.S. at 241 n. 6, 102 S.Ct. 252 (quoting *Gulf Oil*, 330 U.S. at 509, 67 S.Ct. 839).

Austria's interest in all Kaprun-related litigation is "far greater" than New York's interest, given that "many if not most of the 155 victims were Austrian, the safety of Austria's transportation system is implicated", and "much of the alleged wrongful conduct [was committed] within Austria's borders."[97] *Second,* for many of the same reasons, it is a virtual certainty that Austrian law will govern most issues in these cases.[98] Although this Court previously found that the necessity of broaching questions of Austrian law did not warrant the dismissal of Kaprun-related litigation, defendants now argue, convincingly, that recent proceedings in Austria "highlight the massive commitment of resources that Austria has made, over which plaintiffs in the[se] cases explicitly ask this Court to pass judgment."[99] The Austrian trial court which oversaw the 2002 criminal proceeding reserved the right of victims, survivors and their families to pursue civil lawsuits under Austrian tort law. Many such lawsuits were subsequently filed. The Austrian government formed a mediation committee for the purpose of actively promoting the settlement of Kaprun-related litigation.[100] Although the existence of these related civil proceedings is not decisive, plaintiffs'

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[97] *Ski Train III,* 230 F.Supp.2d at 390.

[98] *See id.* (holding that because Austria was "the locus of the tort" and has a greater interest in the litigation than New York, this Court will "likely be required to apply" Austrian law to plaintiffs' claims).

[99] STS Mem. at 15.

[100] *See id.*

total failure to address this issue is troubling, especially because many of the foreign plaintiffs here are pursuing potentially overlapping individual lawsuits in Austria.

Plaintiffs also neglect defendants' assertions that because Austrian tort law is undergoing reexamination and revision in the wake of the Kaprun disaster, the task of ascertaining and applying Austrian law will be unusually difficult.[101] To the extent that this Court is willing to apply even the most complicated or convoluted principles of foreign law, it is of some concern that plaintiffs *implicitly* are urging this Court to "simply ignore what is transpiring in Austria. . . ."[102] As the Supreme Court has instructed, the avoidance of such "unnecessary problems in conflict of laws" supports forum non conveniens dismissal.[103]

Plaintiffs make the outlandish statement that because the "Kaprun Criminal Process" is over "there is no longer any public or private interest in Austria for the claims to be adjudicated there."[104] Such sweeping conclusions cannot rescue these foreign plaintiffs from the obvious: their U.S. cases have "dragged on for years, without resolution of the threshold jurisdictional issues, let alone development [or complete

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[101] *See id.* (citing Kodek 2007 Decl. § 4).

[102] *Id.*

[103] *Piper Aircraft*, 454 U.S. at 241 n. 6, 102 S.Ct. 252 (citation omitted).

[104] Pl. Mem. at 4.

discovery] of the merits" of their claims, due to the inconvenience of litigating them in this forum – an inconvenience that is "out of all proportion" to plaintiffs' purported convenience.[105]

III. CONCLUSION

In accordance with this Court's findings that plaintiffs' choice of forum is entitled to greatly diminished deference, that Austria is an adequate alternative forum, and that the scales of convenience tip overwhelmingly in favor of dismissal, all five actions within this MDL brought solely on behalf of foreign plaintiffs are dismissed on the ground of forum non conveniens.[106] The Clerk of Court is directed to close these cases [Nos. 03 Civ. 8960; 03 Civ. 8961; 06 Civ. 2811; 07 Civ. 935; 07 Civ. 3881].[107]

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[105] *Sinochem*, 127 S.Ct. at 1190.

[106] Aside from the fact that *Mitsumoto v. The Republic of Austria*, No. 06 Civ. 2811, and *Stadman v. Austrian Nat'l Tourist Office*, No. 07 Civ. 3881, name sovereign entities (amongst others) as defendants, they are so substantially similar to *Blaimauer*, *Geier* and *Mitsumoto v. Robert Bosch* – *i.e.*, all five actions were filed solely on behalf of foreign plaintiffs and arise out of the November 11, 2000 ski train fire in Kaprun, Austria – that a nearly identical forum non conveniens analysis applies, and dictates the same result.

[107] Because these cases are dismissed on the ground of forum non conveniens, the following motions are now moot: (1) Bartlett, McDonough, Bastone & Monaghan LLP's Motion to Quash Subpoena Served on Behalf of Foreign Plaintiffs (Docket No. 138; 03 Civ. 8960); (2) Omniglow's Motion to Dismiss Pursuant to Fed.R.Civ.P. 56 for Lack of Standing (Docket No.

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SO ORDERED.

121; 03 Civ. 8960); (3) Foreign Plaintiffs' Motion to Disqualify and Sanction E. Gordon Haesloop, Esq. and Bartlett, McDonough, Bastone & Monaghan LLP (Docket Nos. 25, 29, 30; 07 Civ. 935); (4) St. Paul Travelers' Motion to Quash Subpoena Served on Behalf of Foreign Plaintiffs (Docket Nos. 45, 46; 06 Civ. 2811); and (5) Foreign Plaintiffs' Motion for Rule 60 and Other Relief as Against GBK (Docket No. 48; 06 Civ. 2811). Additionally, several defendants have joined in Bosch Rexroth's Motion for Sanctions Under 28 U.S.C. § 1927 and to Disqualify Edward D. Fagan, Esq. as Plaintiffs' Counsel (Docket No. 159; 03 Civ. 8960). Although the disqualification portion of this motion is now moot, the Court will address defendants' request for sanctions in a separate Order.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 5th day of March, two thousand and ten.

HERMAN GEIER, survivor of Nov. 11, 2000 Kaprun fire, BIRGIT GOTZ, survivor of Nov. 11, 2000 Kaprun fire, ROLAND MAYERHOFER, survivor of Nov. 11, 2000 Kaprun fire, JOOP H. STADMAN, father of Barry Stadman killed in Nov. 11, 2000 Kaprun fire, ERWIN GOTZ, survivor of Nov. 11, 2000 Kaprun fire, MANFRED HILTEL, survivor of Nov. 11, 2000 Kaprun fire, MARKUS HILTEL, survivor of Nov. 11, 2000 Kaprun fire, THOMAS KRAUS, survivor of Nov. 11, 2000 Kaprun fire, ELAINE MAYERHOFER, survivor and relative of Karl and Barbara Mayerhofer (both killed in Nov. 11, 2000 Kaprun fire), MARIA MAYERHOFER-KARG, mother of Karl Mayerhofer (killed in Nov. 11, 2000 Kaprun fire), AGNES WOLF, survivor of Nov. 11, 2000 Kaprun fire,

Plaintiffs-Appellants,

Docket Nos. 08-4032-cv(L)
08-4090-cv(con)
08-4097-cv(con)
08-4153-cv(con)
08-4160-cv(con)
08-4407-cv(con)
08-5443-cv(con)
08-5460-cv(con)
08-5515-cv(con)
08-5516-cv(con)
08-5518-cv(con)
08-5526-cv(con)
09-2080-cv(con)

(Filed Mar. 5, 2010)

v.

OMNIGLOW CORPORATION, OMNIGLOW L.P., OMNIGLOW MANAGEMENT LLC, SCIENS CAPITAL PARTNERS L.P., GMS ACQUISITION PARTNERS LLC, CYALUME TECHNOLOGIES INC., OMNIGLOW LLC, HYDAC TECHNOLOGY CORP., SIEMENS TRANSPORTATION SYSTEMS, INC., BOSCH REXROTH CORPORATION, OMNIGLOW LIMITED PARTNERS OF NY, WIKA INSTRUMENT CORPORATION, EXXON MOBIL CORPORATION,

Defendants-Appellees.

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Appellants Kaprun Victims, Survivors and Families having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT,
Catherine O'Hagan Wolfe,
Clerk of Court
[SEAL]

/s/ Catherine O'Hagan Wolfe